

**COMMERCE, JUSTICE, SCIENCE, AND RE-
LATED AGENCIES APPROPRIATIONS FOR
FISCAL YEAR 2017**

WEDNESDAY, JANUARY 20, 2016

U.S. SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 10:08 a.m., in room SD-192, Dirksen Senate Office Building, Hon. Richard C. Shelby (chairman) presiding.

Present: Senators Shelby, Boozman, Capito, Lankford, Mikulski, Feinstein, Reed, Coons, Baldwin, and Murphy.

**OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S ROLE IN
IMPLEMENTING NEW EXECUTIVE ACTIONS RELATED
TO GUN CONTROL**

STATEMENTS OF:

**HON. LORETTA E. LYNCH, ATTORNEY GENERAL, DEPARTMENT OF
JUSTICE**

**HON. LUTHER STRANGE, ATTORNEY GENERAL, STATE OF ALA-
BAMA**

**HON. KEN CUCCINELLI, FORMER ATTORNEY GENERAL, COMMON-
WEALTH OF VIRGINIA, AND FOUNDING PARTNER AND ATTOR-
NEY, UNITED SELF DEFENSE LAW FIRM**

**MARK BARDEN, FOUNDER AND MANAGING DIRECTOR, SANDY
HOOK PROMISE**

**DR. JOYCE LEE MALCOLM, PROFESSOR, GEORGE MASON UNIVER-
SITY SCHOOL OF LAW**

OPENING STATEMENT OF SENATOR RICHARD C. SHELBY

Senator SHELBY. This hearing will come to order.

Madam Attorney General, we thank you for joining us today to discuss the President's recent executive actions.

As chairman of this subcommittee, I believe that it is my duty to the American people to properly oversee the Department of Justice and ensure that any funding provided by this subcommittee is used as Congress intended and within the bounds of the Constitution.

It is clear to me that the American people are fearful that President Obama is eager to strip them of their Second Amendment rights.

Let me be clear. The Second Amendment is not a suggestion. It is an individual right protected in the Bill of Rights that has been recognized by the Supreme Court.

And with that in mind, this morning I am very concerned with the recent executive actions by the President for two main reasons.

First, President Obama I believe is far too willing to end run Congress through executive action. The President has said that he believes that when Congress does not act the way he wants us to, then he must act alone. Our Constitution will not allow for this kind of unilateral action, and the American people will not stand for it.

Whether through executive amnesty to thousands of illegal immigrants or increased gun control measures, the President has unwisely, I believe, acted alone.

However, what the President fails to remember is that we have a system of checks and balances, a system that was created to ensure that power was not concentrated in a single branch of the Federal Government.

The President, I believe, has ignored the Founders' system and has accelerated the use of executive fiat to an alarming new level.

Secondly, none of these executive actions that President Obama has proposed would have prevented the recent tragic events in our Nation.

Whether it is a terrorist attack or a single gun crime, I firmly believe that those responsible should be held accountable and that we must work to prevent it from happening again.

As we have seen time and again, this President uses tragic events to push his political agenda. I believe that he is more interested in grandstanding and engaging in anti-gun theatrics than actually doing the work necessary to protect this country.

In the wake of the terrorist attacks in San Bernardino, President Obama did not address our law enforcement's failures which allowed those terrorists to live among us. He also did not look at making changes to our immigration system after it clearly failed us by allowing an individual who should have been known to be a violent extremist to enter our country. Instead, the President's immediate response was to propose additional gun control measures.

Let us be clear. Criminals and terrorists are not buying their guns from gun shows, gun stores, or collectors because criminals, by definition, do not follow the law.

Madam Attorney General, we live in a dangerous world, as you know, and the American people are looking for us to do everything in our power to keep them safe. The next time a terrorist attack occurs in this Nation, innocent law-abiding Americans must have the ability, I believe, to protect themselves and their loved ones from harm, if they so choose. It is our responsibility, I believe, to preserve their rights and not limit them.

I believe most of us know that this President has made no secret of his desire to restrict the Second Amendment rights of law-abiding American citizens. The American people deserve and I believe they expect more from their President. They also expect more from their Members of Congress, and I intend to live up to their expectations.

Madam Attorney General, the Department is on notice. This subcommittee will have no part in undermining the Constitution and the rights that it protects.

Senator Mikulski.

STATEMENT OF SENATOR BARBARA A. MIKULSKI

Senator MIKULSKI. Thank you very much, Mr. Chairman, and I congratulate you on holding a hearing so quickly in the opening session and taking up the topic or the issue of guns and their excessive availability in our society.

This hearing does tackle the very pressing issue of guns and gun violence. On the average, 300 Americans are shot every day. Ninety of them will die, almost a third. We do need to change our Nation's culture of violence. We do need to stop guns from getting into the wrong hands, the criminals, those with mental illness, without infringing on the right of law-abiding citizens to purchase firearms.

But know that I do support the President's measure on guns. He is within his constitutional authority to act and many of these activities like adding more FBI and ATF agents have been strongly supported by this subcommittee. I think last year's omnibus under your chairmanship, sir, really showed our commitment to enforcing the existing laws and providing the staff in order to do it.

I do look forward to hearing Attorney General Loretta Lynch's testimony today on the President's recent announcement on guns and the impact it will have on the American people and whether it will make us safe. No mincing, no message, no talking points. Will it really help the American people? Are we within our constitutional boundaries? We do respect the Constitution and also, though, its impact on the Justice Department's ability to deal with this.

We also will listen to the testimony of outside witnesses on the second panel. These are excellent people who are well seasoned, well experienced, then also a father who will talk about the grim things that happened at Sandy Point.

No one is immune from gun violence, whether you are a Congresswoman trying to meet with your constituents named Gabby Gifford, whether you are children going to elementary school in a wonderful suburban community called Sandy Hook, whether you are just simply going to the movies or going to a community college or sitting in a Charleston church of iconic nature in the civil rights struggle to study the Lord's word and welcome in a stranger to end in such a terrible tragedy. Our President was at that funeral, as he has been at so many, and what he says, we have to do something.

So we look forward to this and we look forward to what the President's proposals will be in the new year, the budgetary recommendations that he puts behind it. We are appropriators. We look forward to the President's recommendation. I am particularly interested in strengthening the National Instant Criminal Background Check System (NICS). There are backlogs. There are technological glitches. People who want to go by the law are frustrated. We have to enhance the FBI's capacity to run background checks while we are asking them to do a lot of other background checks. Are there new ways to do this and to train local law enforcement?

But this is not only a Justice Department problem. I just left the HELP Committee hearing where we are holding a hearing on mental illness. And for so many people who are victims of gun violence, the volatile combination of mental illness and access to guns is dangerous.

Mr. Chairman, I look forward, though, not to me talking and listening to myself but listening to the Attorney General and listening to this wonderful panel that you have invited to participate today. So let us solve the problem. Let us not get involved in constitutional arguments, and let us help our American people be safe and secure in their home, their neighborhood, their school, and their house of worship.

Senator SHELBY. Madam Attorney General, welcome to the subcommittee again. Your written testimony will be made part of the hearing record. You proceed as you wish.

STATEMENT OF HON. LORETTA E. LYNCH, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Attorney General LYNCH. Thank you, Mr. Chairman. Good morning, Chairman Shelby, Vice Chairwoman Mikulski, and the distinguished members of this subcommittee. I greatly appreciate this opportunity to appear before you today to discuss the steps that the Department of Justice is taking to reduce gun violence and to ensure smart and effective enforcement of our Nation's gun laws.

Now, of course, as this subcommittee well knows, our Nation faces an epidemic of gun violence that has taken a devastating toll on communities throughout the country. Each and every year, tens of thousands of Americans are injured or killed by firearms in armed robberies, domestic disputes, tragically suicides, accidents, shootouts, and heinous acts of mass violence. From law enforcement officers shot down while defending their communities, to children killed in tragic accidents, our friends and family members, our neighbors, our fellow citizens are being taken from us day after day after day.

As the list of tragedies involving firearms has grown, so has the American people's belief that we must do more to stem the tide of gun violence, and this administration is committed to doing our part. The executive actions that the President announced 2 weeks ago, including the measures that I recommended to him, are essential components of this effort. They are important steps that are within the executive's power to clarify existing legal provisions, to focus enforcement efforts, and to spur innovation.

I have complete confidence that the common sense steps announced by the President are lawful. They are consistent with the Constitution, as interpreted by the Supreme Court, and the laws passed by Congress. For example, the Gun Control Act lists the people who are not allowed to have firearms, such as felons, domestic abusers, and others. Congress has also required that background checks be conducted as part of sales made by federally licensed firearms dealers to make sure that guns stay out of the wrong hands. The actions announced by the President, which focus on background checks and keeping guns out of the wrong hands, are fully consistent with the laws passed by Congress.

Taken together, the new executive actions will bring progress on a number of fronts. By clarifying what it means to be “engaged in the business” of dealing firearms, we raise awareness of and enhance compliance with laws that are already on the books. By issuing new regulations, we ensure that licensed dealers who ship weapons will report them if they are lost or stolen in transit, and that those trying to acquire some of the most dangerous weapons through trusts or corporations undergo background checks. By enhancing our national system of background checks, we will be better prepared to keep guns out of the wrong hands in the first place. By increasing access to mental health care treatment with a proposed \$500 million investment to the Department of Health and Human Services, also referred to as HHS, we will not only be helping those in need, but we will also be curbing gun deaths, the majority of which tragically result from suicide. And by supporting research on gun safety technology, we will be laying the groundwork for a safer future and drawing on our strength as the most technologically advanced nation on earth.

The steps that I have outlined and the actions that President Obama has described are all well reasoned measures well within existing legal authorities and built on work that is already underway. They clarify laws that are already on the books because clear notice will help ensure that those laws are followed. They direct important resources to our law enforcement agents because these men and women deserve to have the support they need to do their difficult jobs effectively. And they lay the groundwork for State governments to more easily provide information to our background check system and for helping people with mental illness gain access to care because in addition to helping people get the treatment they need, we must make sure we keep guns out of the hands of those who are prohibited by law from having them. And they invest in research and promising technology that will make weapons safer because problem solving through innovation has always been one of our country’s greatest strengths.

Mr. Chairman, Vice Chairwoman Mikulski, I am confident that these actions will help to make our people safer, our communities more secure, and our law enforcement more effective. But I also have no illusions that these measures by themselves will end gun violence in America. At a time when there is so much work to be done and so much capacity for progress, there are many areas where only Congress can act. We would welcome the opportunity to work with you to further these goals. And that is why I am so grateful to have this opportunity to speak with you today about how we can work together to reduce gun violence in this country, and I look forward to continuing this conversation in the days ahead as we discuss how to keep our promise to protect and defend every American’s right to safety and security and to life and liberty.

At this time, I look forward to answering any questions you may have. Thank you.

[The statement follows:]

PREPARED STATEMENT OF HON. LORETTA E. LYNCH

Good morning, Chairman Shelby, Vice Chairwoman Mikulski, and distinguished members of the subcommittee. I appreciate this opportunity to appear before you today to discuss steps the Department of Justice is taking to reduce gun violence and ensure smart and effective enforcement of our Nation's gun laws.

As this subcommittee well knows, our Nation faces an epidemic of gun violence that has taken a devastating toll on communities throughout the country. Each and every year, tens of thousands of Americans are injured or killed by firearms—in armed robberies, domestic disputes, suicides, accidents, shootouts, and heinous acts of mass violence. From law enforcement officers shot down while defending their communities, to children killed in tragic accidents, our friends and family members, neighbors and fellow citizens are being taken from us—day after day after day.

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These actions will involve important investments in the Federal Bureau of Investigation (FBI) and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) over the course of fiscal years 2016 and 2017—some of which have already been appropriated, and some of which will be requested in the coming year. This year, the FBI will be dedicating \$6.6 million to begin filling 230 new positions to support the National Instant Criminal Background Check System (NICS), which we are currently working to transition to a round-the-clock service. ATF will be investing \$4 million to enhance the capabilities of its National Integrated Ballistic Information Network (NIBIN), including support for the National NIBIN Correlation and Training Center in Huntsville, Alabama, which is set to open in February 2016.

In fiscal year 2017, the President's budget will request \$80.3 million to sustain and expand upon these critical investments. When the budget submission is delivered to Congress on February 9, the FBI's request will include \$35.0 million to sustain the fiscal year 2016 NICS expansion, enabling the Bureau to increase the number of personnel processing firearms background checks and enhance the recruitment and retention of the personnel in these critical jobs. ATF's request will include \$35.6 million for an additional 200 Special Agents and Industry Operations Investigators—vital personnel who will enforce existing Federal firearms laws, take violent criminals off the street, prevent firearms from getting into the wrong hands, and enhance ATF's ability to perform its regulatory duties. ATF will seek to invest an additional \$4.0 million in NIBIN above the fiscal year 2016 funding level to support additional staff hiring, and \$5.7 million to help process Federal firearms license applications and National Firearms Act applications, as well as to support gun crime tracing—a critical service provided to Federal, State, and local law enforcement across the country.

The steps that I have outlined—and the actions that President Obama has described—are all well-reasoned measures, well within existing legal authorities, built on work that's already underway. They clarify laws that are already on the books—because clear notice will help ensure that those laws are followed. They direct important resources to our law enforcement agents—because these men and women deserve to have the support they need to do their difficult jobs effectively. They lay the groundwork for State governments to more easily provide information to our background check system and for helping people with mental illnesses gain access to care—because in addition to helping people get the treatment they need, we must make sure we keep guns out of the hands of those who are prohibited by law from having them. And they invest in research and promising technology that will make weapons safer—because problem-solving through innovation has always been one of our country's greatest strengths.

I am confident that these actions will help to make our people safer, our communities more secure, and our law enforcement more effective. But I also have no illusions that these measures by themselves will end gun violence in America. At a time when there is so much work to be done and so much capacity for progress, there are many areas where only Congress can act. We would welcome the opportunity to work with you to further these goals. That's why I am so grateful to have this opportunity to speak with you today about how we can work together to reduce gun violence in this country. And I look forward to continuing this conversation in the days ahead as we discuss how to keep our promise to protect and defend every American's right to safety and security, and to life and liberty.

At this time, I'd be glad to answer any questions you may have.

Senator SHELBY. Thank you.

CONSTITUTIONAL RIGHTS

Madam Attorney General, as I said earlier, the Constitution is not a suggestion. You would agree with that, would you not, that the Constitution of United States is not a suggestion?

Attorney General LYNCH. Mr. Chairman, I agree that it is the law of the land and the law that we are all sworn to uphold.

Senator SHELBY. The rights that it conveys to the people of this Nation are not recommendations. You would agree with that, would you?

Attorney General LYNCH. Mr. Chairman, I agree with you on that, as well as your previous proposition.

Senator SHELBY. And the Constitution, obviously, is—the Second Amendment is part of the Constitution, the Bill of Rights. Right?

Attorney General LYNCH. It is an important part of the first set of amendments, that Bill of Rights.

Senator SHELBY. And do you believe that the rights granted by the Second Amendment are equally as important as those granted by the First Amendment and the Fourth Amendment, the Fifth Amendment, the Seventh Amendment and so forth? Would you say that it is all an integral part of the Constitution?

Attorney General LYNCH. Senator, I believe the Bill of Rights and the subsequent amendments are, indeed, an integral part of the Constitution, as well as the case laws that seek to interpret them.

Senator SHELBY. Okay.

Madam Attorney General, you say that you worked closely with the President to craft these executive actions to go as far as the President can legally go without overstepping. While we may disagree about whether or not the President has overstepped—and I am sure we would—I am concerned that the President is slowly, slowly chipping away at our Second Amendment rights. Can you guarantee us, Madam Attorney General, that there is legal author-

ity for the President to take the actions that he has taken? And can you provide the specific laws or court cases that support the position?

Attorney General LYNCH. Mr. Chairman, with respect to the recommendations that I made to the President, as indicated in my earlier remarks, I believe that they are consistent both with the Constitution and existing case law that interprets the Constitution, specifically the Heller case, handed down by the Supreme Court, that defined the Second Amendment and clarified the individual's right to bear arms, as well as the agency's right to promulgate guidance therefrom as well.

With respect to the actions taken, I am confident that they are consistent with the laws of the land. They are within the President's authority because they seek to enforce the existing laws. They seek to strengthen the provisions that Congress has directed that we undertake to keep the American people safe, such as the NICS background system. They seek to enhance protections for those who have mental illness, providing greater treatment for them, another goal that I know this subcommittee supports.

BACKGROUND CHECKS

Senator SHELBY. Each time there is a mass shooting, the issue of expanded background checks reenters the public debate. I think we must look at the facts, and the facts are that most of those actions are carried out by individuals that would not have been prevented by obtaining a firearm. The Sandy Hook crimes were committed by a young man who shot his mother and stole her guns. Now, Madam Attorney General, would a background check have prevented that horrible tragedy?

The Virginia Tech shooter actually passed a background check to get his guns, much like those that committed similar crimes at Fort Hood, Aurora, Chattanooga, and the list would go on and on.

More recently the terrorists responsible for the attacks in San Bernardino obtained their guns through a straw purchase, which means a background check would not have helped them either.

Yet, we keep coming back to this issue.

Madam Attorney General, could you walk through these examples and tell us how having more Federal firearms licensees would have altered the outcome of those events?

Attorney General LYNCH. Mr. Chairman, as I indicated, I do not believe that we are able to look back and find a specific measure that would prevent a specific crime. But that does not mean we must not seek to prevent future tragedies.

With respect to strengthening our background system, sadly the NICS system is overwhelmed at this point in time. And of course, as we saw with the tragic shooting in Charleston, that individual's information was submitted, but because of a series of glitches through experienced and well-meaning examiners, the information needed was not discovered in time to prevent that.

The licensed firearms dealers who submit this information deserve the best and most efficient NICS system that we can provide them. The individuals who submit their information and wait for that response also deserve the most efficient system that we can provide them. And certainly the measures that we are discussing

today, for example, increasing the number of examiners for the NICS system, of course, a matter directly related to our appropriations, seek to serve that important end.

With respect to other tragedies, again, because as I look through the panoply of criminal laws, which give us a way to protect people and vindicate the rights of those who have been the victims of crime, yet have not yet found a way to erase the human condition that leads to crime. We are committed to doing everything we can, looking forward, to making sure that our gun laws are effectively enforced and that our American people are kept as safe as possible.

Senator SHELBY. Madam Attorney General, as we look back on some of these tragedies—and they are real tragedies—which of these individuals bought their gun from a gun show and which of these criminals purchased their gun illegally online? I do not believe they did. Did they?

Attorney General LYNCH. Mr. Chairman, I am not able to give you that information now.

But what I can indicate is that with respect to the clarifications on who is required to seek a license as a federally licensed firearms dealer, that this is in response to inquiries that the Bureau of Alcohol, Tobacco, Firearms, and Explosives receives on a regular basis as they operate within gun shows to provide information and guidance. And they often receive telephonic inquiries as well from individuals seeking to comply with the law who want to know what are the standards, what are the things that determine whether or not they need to, in fact, apply for a license.

INTERNET GUN SALES

Senator SHELBY. The area of new standards for gun dealers. A recent “New York Times” article states that the President’s plan on gun control would require officials from the Bureau of Alcohol, Tobacco, Firearms, and Explosives to begin contacting gun sellers to let them know of new standards to clarify who would be considered a regulated dealer. The article goes on to suggest that the changes are particularly meant for online gun merchants who avoid conducting background checks in spite of making “high volume gun sales through certain Web sites.”

Madam Attorney General, the law requires that anyone selling guns for profit, which I believe would be high volume gun sales, to have a Federal firearms license. However, you are quoted in the article as saying—the article in the “New York Times”—right now, in your words, “it is really an Internet loophole.”

Is this really a loophole in the law or it is a failure of enforcement?

Attorney General LYNCH. Well, Senator, I typically do not comment on news articles and would prefer to provide my own response to that particular issue.

With respect to Internet sales, they are increasing. Not only do we see an increase in sales at the typical commercial level, at which the average consumer may, in fact, appropriately buy a number of commodities, including firearms. We also see firearms sales growing on what is called the Darknet, that is the particular part of the Internet not accessible to the average consumer but where illicit transactions are primarily held. These are not trans-

actions where average law-abiding citizens are seeking to acquire a firearm lawfully and through the traditional process. These are Internet sales where criminals are seeking to acquire firearms through which they can harm our American citizens. This is not a loophole per se, but it is an area of enforcement that the ATF has been focused on.

As you indicated, with respect to the individuals who operate at gun shows, flea markets, and the like, there will be an educational component to the guidance. This information will be provided to them. They will be allowed to ask questions. And we believe that this will increase compliance and frankly lessen confusion among those individuals seeking to comply with the law.

But where individuals operate on the Darknet, primarily in illicit transactions, it will also put them on notice so that if enforcement actions need to be taken, there can be no discussion that they simply were not aware of this particular provision.

COMMUTATIONS AND PARDONS

Senator SHELBY. Madam Attorney General, I believe what we really should be talking about, not just here today but across America, is how to keep guns out of the hands of criminals and violent offenders. This is an uphill battle, I believe, if the President continues to focus on eroding Second Amendment rights while commuting the sentences of criminals with firearm convictions. And while we can debate—and we will debate—the issue of mandatory minimum sentences, the President’s actions to commute sentences of individuals convicted of illegally possessing a firearm is disturbing.

I do not know, Madam Attorney General, these individuals or why the President feels that they need shorter sentences, but I do know this. This sends a message to criminals that if you commit a crime with a gun, this administration will not be hard on you, perhaps go easy on you. That is the wrong message.

Are the President’s actions, Madam Attorney General, not sending a mixed message to Americans? One day he issues new executive actions to change gun regulations, and then pardons criminals with gun-related convictions the next day. How can the President and you, the Attorney General representing this administration, say he is committed to using every tool at the administration’s disposal to reduce gun violence when his own administrator is not following through with the sentences of criminals with gun-related convictions? Does that trouble you?

Attorney General LYNCH. Well, Mr. Chairman, I do not know the specific cases to which you refer.

Senator SHELBY. We will give you a list of them.

Attorney General LYNCH. What I can tell you is that with respect to commutations or pardons, individuals who apply for those are carefully reviewed and carefully vetted, and only after consideration of a number of factors. In particular, there has been recent discussion about commutations of nonviolent drug offenders and whether or not those individuals also have firearms convictions. I would need to know the specific case to which you are referring.

But with respect to the President’s Clemency Project, for example, it is a focus on looking at individuals who today would not nec-

essarily have received the lengthy narcotics sentences they received and who also otherwise qualify as nonviolent and with a particular type of record.

And certainly I am happy to provide information, to the extent that it is helpful, on specific cases if you could alert me to them.

I think that with respect to the issues that we are discussing today, providing clarification of existing case law, gathering the existing case law so that individuals seeking to comply with the law have in one spot an easy-to-read, comprehensive reference to what the existing law says qualifies as engaged in the business of dealing in firearms so that they know whether they have to apply for a license or not, also that their questions can be more informed is in fact helping the American people clarify this important issue.

Clarifying the issue of who needs to report a firearm that is lost or stolen in transit allows ATF to begin investigations of stolen firearms much more quickly than we are able to now. Now we recover, Senator, on average 1,300 guns a year from crime scenes that turn out to be either lost or stolen, and we do not know that information until they are recovered in the course of a criminal investigation. Learning that information earlier will help us to start the investigation earlier and hopefully find those shipments before they fall into the hands of criminals, which is, of course, the goal of all of us here.

Senator SHELBY. Madam Attorney General, I will not go through the record here, but I have been handed by staff here a number of people who were convicted of possession of firearms during committing a criminal act or using a firearm during a criminal act that have been let out of prison early and put back on the people, which is dangerous.

Thank you for your indulgence. Senator Mikulski.

Senator MIKULSKI. Madam Attorney General, it is good to see you again. We welcome you back to this subcommittee. We from Maryland, we from Baltimore particularly thank the Justice Department for all of their help during our recent challenges in Baltimore related to the uprising we had over one young man's death, Freddie Gray, which now is going through the judicial system. And we are examining the need for additional criminal justice reform within our police department.

But, Madam Attorney General, over 350 Baltimoreans were killed last year. Three hundred fifty dead, some of whom were little children who were killed as innocent bystanders or there is a question of whether it was revenge killing. This was criminal work, the growing nexus of drugs, crime, guns, violence, murder.

My question to you—when I look at the 350 deaths, what can we do in just plain English to keep guns out of the hands of the criminals? I know we are talking about Second Amendment rights. Maryland is a State with enormous numbers of hunters, a gun tradition particularly in our area. But the gun tradition in Baltimore City should not be that the drug dealer is the one who gets the guns. How can we, in either the President's new proposals or in current law, really have an aggressive effort on this issue of guns and criminals?

Attorney General LYNCH. Thank you, Madam Vice Chairwoman.

I think one of the most important things we can do is make sure that the Bureau of Alcohol, Tobacco, and Firearms is fully resourced. Our request for 200 additional agents and investigators for fiscal year 2017 is something that will, of course, be coming before the subcommittee with the 2017 budget. We do intend to, in our spend plan, send up information about the beginning of that process even this fiscal year.

The law enforcement priorities of ATF at this point, consistent with the Smart on Crime plan, are in fact to focus on the violent crime issue that you have just described, to focus on individuals who terrorize neighborhoods, who harm children, who essentially through the unlawful possession of firearms create a danger to law-abiding Americans seeking to live their lives in our vibrant cities. We are targeting not just the gun traffickers, but as my ATF Director calls it, the “trigger pullers,” gang violence, places where we have seen an increase in violent crime. We are looking at ways to target our resources to focus on those individuals who are causing the most harm to our communities.

HEROIN EPIDEMIC

Senator MIKULSKI. Do you feel that this rise in gun violence—not to interrupt—is related to the growing heroin epidemic? In other words, what has happened in Baltimore City, which is just awful with these over 350 dead, not only the dead, God forbid, but the injured—but this is in every major city that this is going on. So it is just not Baltimore. This seems to me like an epidemic that has hit our big urban areas.

Attorney General LYNCH. Yes, ma’am, indeed. I believe that the phrase “epidemic” accurately captures the problem of the increase in heroin and opiod abuse that we are currently seeing. This is a problem in many of our urban areas. But I must say it has sadly spread across this country. There are many counties with various densities, even many rural areas that are in the grip of an opiod and heroin epidemic, and with that often comes an increase in violence. There our enforcement activities are focused on pairing ATF agents with DEA and FBI agents to target those criminal organizations that are bringing narcotics in and that are protecting the drug trade with their firearms.

Senator MIKULSKI. Well, thank you very much, Madam Attorney General. My time is up.

Senator Baldwin and I just left a hearing chaired by Senator Alexander and Vice Chair Senator Patty Murray on mental illness, excellent panel, very excellent, superb witnesses. And I know that we are going to really talk about this issue of mental illness, people who are mentally ill getting drugs. This whole issue of privacy rights, what do you know, how do you stop—the Virginia Tech situation comes to mind, and we could go through other cases. But in Virginia Tech, that young man had been in and out of institutions. Who knew? Who could help? When do we intervene? And just their ability to get these guns.

We also had a shooting at Columbia Mall. We all have shootings. That is what is so terrible. We all have shootings.

So I look forward to hearing your comments also on the mental illness aspect, but I know we have excellent other Senators here

who want to get their questions. I am going to hear their questions and your answers. Thank you very much.

Attorney General LYNCH. Thank you.

Senator SHELBY. Senator Lankford.

FAST AND FURIOUS DOCUMENT SUBPOENA

Senator LANKFORD. Good morning to you.

Attorney General LYNCH. Good morning, Senator.

Senator LANKFORD. Thank you for being here and being a part of this.

Let me bounce a couple questions off of you that are timely as well. I served previously in the House of Representatives on the Oversight and Government Reform Committee. I was part of the committee when we went through the subpoena process to ask your predecessor for additional documents for the Fast and Furious investigation on guns. Those were delayed to us. Privilege was announced on that. As of yesterday, a court has told the Attorney General's Office that those documents need to be turned over by February 2.

I need clarification. Will all those documents now be released to the Oversight and Government Reform Committee by February 2, as per the judge's order?

Attorney General LYNCH. Well, thank you for the question, Senator.

We did receive that ruling yesterday. We are still reviewing that ruling. I am aware of that provision, and we of course want to study it carefully and determine what appropriate steps to take and the timeliness of them. But I can certainly assure you that we will be either responding to the committee or to the court at the appropriate time.

Senator LANKFORD. So you are not saying yes or no whether those documents will be turned over in time. Clearly they have been collected. They have been collected for years.

Attorney General LYNCH. If we will pursue any additional legal action. We have not made that decision. If we had, I would let you know. But since we have not, I am not able to give you that information at this time.

Senator LANKFORD. Do you know when that answer will come back out?

Attorney General LYNCH. We will let you know certainly within the time period that you have just mentioned.

ATF AND FBI PROCESSES

Senator LANKFORD. One of the conversations that I had with your predecessor was on process issues with ATF and FBI. FBI and ATF have two different sets of processes for many investigations. Those can be combined to make sure that we have clear processes across DOJ on it. Do you know of any kind of progress that has been made of late with ATF in trying to align with some of the FBI processes for how they do investigations in that process?

Attorney General LYNCH. Well, Senator, I would need to know a bit more of the context of the processes you refer to, whether you are referring to either deconfliction or joint efforts. If you could provide that, I am happy to—

Senator LANKFORD. We would be glad to. We will try to follow up on that because that was an ongoing conversation that he and I agreed on and that there was a process moving on that.

FEDERAL FIREARMS LICENSES

Let me ask about some of the guidances, as you have mentioned several times, for the Federal firearms licenses. The guidance that has come out seems to be the same as it was before, basically saying that if you are in the business of dealing in firearms, then, yes, you have to be licensed. That is nothing new on it. What we are trying to get at is what is the new definition. The previous definition for that seemed to change during the Clinton administration actually to have a lower number, to say people that are kitchen table dealers that are actually selling to their neighbors or occasionally sell a firearms out of their own collection—they are not a licensed dealer. What we are trying to get at is the clarification of who is a licensed dealer. When will that clarification come out of what you are proposing, and will it be a regulatory change or a guidance document?

Attorney General LYNCH. Well, Senator, the guidance document that has been promulgated does exactly that. It answers the question that you have raised. It collects information from all the cases that have considered this issue and provides, through a series of clear examples, a definition for when someone is engaged in the business and when they are not. And you are correct in the sense that the definition has not changed because the statute has not changed.

Senator LANKFORD. Right.

Attorney General LYNCH. We are simply gathering the case law, the legal definitions that have been promulgated by courts in situations where people have been found to be engaged in the business and also where they have clarified the definition of the hobbyist and the collector because those exceptions also are still part of the law. Hobbyists and collectors are not required to obtain a license in order to transfer firearms.

But it is important to note that this information has been scattered in a number of cases throughout the country. And as I mentioned before, ATF was constantly and still anticipates receiving inquiries from individuals seeking to comply with the law, asking if their activities constitute being engaged in a business of dealing in firearms.

Senator LANKFORD. So what will be the clear rule? Is it how many firearms that you sell in a year time period? Is it over a lifetime? Is it the number in your collection? Is it based on the amount of income that you receive? What would be the clear guidance for that?

Attorney General LYNCH. The courts have determined that a number of factors are used in determining whether or not one is engaged in the business. And they have specifically said that there is not a specific number that makes one meet that test. Instead, it is the totality of circumstances. And essentially if one is repetitively selling firearms, if you hold yourself out as a dealer, if in fact you do intend to make a profit, all of these things go into that

calculation. The courts have given different weight because the statute, as you know, does not contain—

Senator LANKFORD. Correct, and that is what we are trying to get at. See, there is a difference between a guidance and a regulation, as you know extremely well. And we are trying to find out if there will be a rule promulgated in this with the guidance. I will walk back through some of those details with you.

BACKGROUND CHECKS

I have one final question I find very important. It is the gathering of information that is going into the background checks. What is called the Interstate Identification Index—is that information used for the criminal background check information as well or only what is going into the national criminal background check, the NICS search? Are both of them used, do you know?

Attorney General LYNCH. I would have to get clarification on that for you. This particular recommendation that we have made to the President focuses on strengthening the NICS system.

[The information follows:]

Yes, both the Interstate Identification Index (III) and the National Instant Criminal Background Check System (NICS) are used.

Senator LANKFORD. This is part of my concern on it as well because this has been an issue. I do not find anyone here that says we should not do background checks and that that database should not be very effective. But if I can have just the pleasure of the chairman for a moment, let me just run through a couple of our States in the States that actually submit information into the NICS system.

If there is a Federal conviction for a felony, that is going into the system right away. But if it is a State felony, as I look through the listing here, Alabama currently has zero felonies—you will be glad to know that, sir—running into the system. California has 4,032. You will be glad to know that is all that is in California felonies. Delaware has zero. Maryland has 12. My fine State of Oklahoma has one, a very law-abiding State clearly. Rhode Island has zero, and Wisconsin has 106. That is not very many coming from our States into the NICS system.

And so the question that I would have is and I think there has been common agreement on, what is happening between the States that they are not submitting the information into the Federal system, or is the Federal system so complicated to get information into that our States of all stripes are not submitting that information?

Attorney General LYNCH. Well, Senator, I think you have raised a very important issue. As you know, after the Virginia Tech tragedy, the Federal Government did reach out to the States and request a greater influx of information into the NICS system. Federal agencies are required to report information into the NICS system. States do it on a voluntary basis. And in fact, in the years since the Virginia Tech shooting, the amount of information coming from all of our States has increased by approximately 70 percent.

Senator LANKFORD. Right, in mental health but not in the felonies.

Attorney General LYNCH. Well, it is increased by 70 percent across a number of categories, and I would not be able to break that out for you.

What I did do also quite recently with the recommendations I provided to the President, I sent a letter to the Governors of every State asking them to essentially look at their systems and processes and make sure that they were, in fact, setting up the most efficient systems to provide information to us.

The Department of Justice also, through its grants programs, does provide support for States who need assistance in categorizing the types of offenses that need to be provided into NICS and possibly also making their own systems consistent with NICS. And we will continue to do that. We look forward to working with our State partners on this. They are very important partners.

Senator LANKFORD. Right. And I would say I know I have indulged the chairman's time, and I apologize for that in going a bit long on this question. But I would say this is an area of common ground where we could actually work together on this, and I look forward to that.

Senator SHELBY. Senator Coons.

Senator COONS. Thank you, Chairman Shelby, and thank you, Vice Chair Mikulski. And thank you so much, Attorney General Lynch, for your leadership at the Department of Justice and for appearing before the Commerce, Justice, and Science Appropriations Subcommittee again.

I was encouraged in your testimony earlier that you want to focus on the smart and effective enforcement of our existing gun laws. And I think the budgetary proposals that you have laid out and the elements of the executive order that you have covered are strong and good attempts to do exactly that. I was pleased to hear you as the Nation's top law enforcement official review what you believe to be the well-settled constitutionality of the actions proposed in the executive order and the actions proposed in the budget. So rather than debating that further, I am going to move forward to what you view as the most valuable parts of the budget request, something where this committee will be taking action.

ATF AND FBI HIRING

A portion of the President's announcement was the addition of 200 new ATF and 230 new FBI personnel. As we have discussed, I have seen tragically firsthand in my hometown of Wilmington what a dramatic spike in gun violence can do to disrupt a town and a community to wreak destruction and pain and loss on families and whole neighborhoods. And I am grateful for how the Department of Justice, through its violence reduction network, has provided additional resources. But I have also seen how access to better quality background checks, access to better quality ballistic information, and an increased Federal law enforcement presence can make a significant difference.

Can you explain in a little more detail why these new ATF agents and new FBI personnel, these new examiners and investigators, are really necessary and how they can help reduce gun violence not just in my hometown but in rural areas and in urban areas all over this country?

Attorney General LYNCH. Yes. Thank you, Senator.

With respect to our request particularly for increased resources for ATF, we have discussed requesting resources that would allow us to hire 200 new agents and investigators. Some of those would, of course, work on the increased paperwork resulting from background checks. But the agents in particular would be focusing on the violent crime problems that we find to be so troubling in so many of our cities and towns and neighborhoods. They will be working in conjunction with task forces of State and local officers because we have found those to be extremely effective ways at focusing on the hotspots in particular areas. It will allow us also to increase the amount of enforcement that we provide over the Internet sales, as I mentioned, but to really focus on the violent crime problems plaguing so many of our cities.

NATIONAL INTEGRATED BALLISTIC INFORMATION NETWORK

In addition to the agents that we are requesting, the resources that we are requesting, as well as those we will begin using this year, would also go towards strengthening what is called the NIBIN network, the ballistics initiative. This is a law enforcement-to-law enforcement initiative that traces guns found at crime scenes, as well as casings, essentially all firearms-related evidence, and shares that information on a nationwide basis with law enforcement entities. It allows us to make connections. It allows us to find connections between firearms, and between those who are using the firearms.

We are, in fact, opening a national center for National Integrated Ballistic Information Network (NIBIN) analysis, which will be located in Huntsville, Alabama. It is due to open I believe in a few months. And this is a tool that our law enforcement agencies depend upon greatly. The ability to track firearms is of grave importance.

In particular, the ability to track stolen firearms is one that we feel can protect our communities. Stolen firearms and even, indeed, those firearms that are lost do not end up in the hands of law-abiding Americans. They end up in the hands of criminals, and they are recovered during criminal investigations. Sadly, they are recovered, at the rate that we have seen of 1,300 a year on average over the last 5 years, once the crime has already been committed. One of the things that these regulations would do is allow us to begin those investigations earlier and hopefully intercept those shipments before they fall into the hands of criminals.

Senator COONS. Let me, just in closing, thank you for the very good work that your team has been doing in partnership with the Wilmington Police Department, John Skinner who is the lead in the Office of Justice Programs. The Department of Justice has done a great job. I have gotten to see firsthand how better access to NIBIN, better access to ballistics tools has improved our homicide case clearance rate in Wilmington from 10 percent 2 years ago to 50 percent this year. That makes a real difference, and having access to world-class and timely analysis and insight of ballistics evidence has significantly improved the investigatory and prosecutorial outcomes in my hometown.

I am excited about this work. It is my hope that on a bipartisan basis we can invest the resources to strengthen Federal law enforcement to tackle gun violence around our country. As was said by Senator Mikulski in the opening, it is a crime, a shame that Americans literally in their going to church to worship, going to see movies, going to college classrooms, going to elementary school have been victims of gun violence. And we must do more together to tackle this very real problem facing our Nation.

Thank you, Madam Attorney General.

Attorney General LYNCH. Thank you, Mr. Senator.

Senator SHELBY. Senator Capito.

Senator CAPITO. Thank you, Mr. Chairman. Thank you, Attorney General, for being here with us today and thank you for your service to our country.

Attorney General LYNCH. Good morning, Senator.

Senator CAPITO. I am very appreciative.

You know, I want to begin my statement by echoing what we have heard across the board, and that is the deep tragedy that we all feel when gun tragedies occur. It hurts us all, and certainly our prayers and thoughts are always with those most deeply affected.

But I do think that acknowledging that there is a great deal of frustration by the unilateral actions that the administration has chosen to take to curb this gun violence—and part of the executive actions seem ambiguous and provide some confusion for law-abiding gun owners, but in other parts, seem a little bit more about political messaging.

But that is not to say we should not take action and we should first act, as we have spoken about and you have very eloquently, to enforce the laws that are already on the books. And I would like to focus on where our common ground is.

As you know, much of the work that we have talked about today is actually conducted in West Virginia. The National Instant Criminal Background Check System (NICS) and the Criminal Justice Information Services (CJIS) system is in Clarksburg, West Virginia, and the ATF tracing facility is in Martinsburg, West Virginia. Their efforts are invaluable to ensure that gun ownership is processed in an efficient and effective manner, and they each have proven their worth helping to track weapons and perpetrators of gun violence when crimes are committed. I have visited both of these facilities and I have seen the professionalism and the deep commitment that they have to getting it right.

You did mention they are overstressed and overloaded and hopefully through the appropriations process that we worked through last year, we were able to increase the budget to make sure that we were able to employ more to make sure that they can successfully complete in a timely fashion the background checks.

NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM

And so I wanted to get an understanding from you. The administration has called for an additional 230 NICS examiners. I understand in your statement—I am sorry that I was not here—that you are going to go to a 24-hour system. Would that be 7 days, 24 hours? Is that your goal?

Attorney General LYNCH. Yes, Senator. The goal is to increase the capacity of the current NICS system so that it could be responsive on a 24-hour, 7-day a week basis. Currently we are limited by staffing, and I believe that we are able to operate 17 hours a day. I actually am not sure if it is 7 days a week at this point in time.

We also do have an electronic platform through NICS. You may have seen that. It is called the E-Check System that allows dealers to get information quickly. And we hope to, frankly, improve that platform greatly. We are working with U.S. Digital Services and gathering information as to how to make that system more efficient so that that also can be up 24 hours a day. Right now, there are times when it must be down for maintenance, it must be down to get information uploaded into it. And so that will help us with the backlog that we are seeing and that frankly we have seen over the last several months and we anticipate will continue.

Senator CAPITO. Have you begun the hiring on that of the 230?

Attorney General LYNCH. With respect to the 230, we do hope to begin hiring of that using this fiscal year's appropriation and then the 2017 request would allow us to maintain that. Because we need to move as quickly as possible, we will likely begin hiring on a contractor basis first. That is usually quicker than hiring full-time employees. But the goal is to have full-time employees on board. As you know, for government employees, there is a significant—I should not say “significant” but there is time required for the background checks and the like. So it will likely be several months before we have that full component on board.

This is, of course, a matter of great concern for us because the NICS system at this point is at a point where it is becoming increasingly difficult to, in fact, process the applications within the 3-day time period.

Senator CAPITO. Right, right. No, I certainly saw that when I was visiting.

Let me ask you this. Senator Lankford I think brought up an excellent point. Your ability to trace and to perform an accurate background check is only as good as the information coming in. And as we saw in the Charleston, South Carolina incident, the information was unable to be traced to that individual. How are we going to meet that challenge? And is that training at the local level? Is it the NICS examiner? What happened there?

Attorney General LYNCH. Well, as I think you know, the NICS examiners are dedicated—

Senator CAPITO. Oh, yes.

Attorney General LYNCH [continuing]. And pursue their jobs with great conviction and commitment.

Senator CAPITO. Absolutely.

Attorney General LYNCH. In the Charleston case, my understanding is that the arrest record was located in one particular jurisdiction, but the query was made of another jurisdiction.

Senator CAPITO. Yes, but how do we get around that?

Attorney General LYNCH. And because there was not a conviction yet, it prevented it from being in the court system. And so the examiner followed all the queries as per normal, and the information was literally sitting in an adjoining county's sort of bucket, so to speak, and so was not pulled in that.

And it was frankly heartbreaking to all of us who worked on this matter from the FBI throughout the Department of Justice and one of the reasons why even then we began looking at ways to improve the NICS system. The FBI Director commissioned a report, and we have folded a number of those recommendations into this request.

Being able to modernize the electronic database will be greatly helpful in making sure that all of the relevant jurisdictions are, in fact, able to be queried. If that could happen on an electronic basis, it would certainly ease the situation.

Of course, looking back, it is impossible to say what electronic system could have prevented this glitch, but certainly going forward, that is one of the things we are looking to do in strengthening the electronic platform for the NICS system.

Also, in terms of the examiners, making sure that they have time to conduct these examinations and to provide a response to the dealers who call in. Most of this is still done over the phone. Most of the responses are still handled very, very quickly. Often the dealer will get an answer in that first phone call. But the difficult cases, the ones where you really do have to look and search and make sure that this individual is not prohibited—those often do take time.

Now, still, it is a system of which we are incredibly proud. Over 2 million people have been prohibited from purchasing firearms as a result of NICS background checks, and we think that that is frankly a benefit to the country and to public safety. So we are incredibly proud of the system but we really do want to make it the best system that we can.

Senator CAPITO. Well, and I want to pledge to work with you to make sure that the fine folks in West Virginia who are doing the NICS system and the background check have the best technology, have enough staff to help them. It is a very stressful position in a lot of ways for many of them, and I hope that with this additional hiring, we will eliminate some of these loopholes that people are able to fall into and prevent those who should not from getting a firearm.

Thank you very much.

Attorney General LYNCH. Thank you, Senator.

Senator SHELBY. Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

Madam Attorney General, you certainly look well and as if you are not worn out by the job. I have not seen you since your confirmation. So it is very good to see you again.

Attorney General LYNCH. Thank you.

Senator FEINSTEIN. I am glad you stressed that the President's executive order largely clarifies existing law, which clarification should make enforcement easier and enforcement is what people seem to want of existing law.

ATF HIRING

However, you do have to have people to enforce existing law. As you have said twice in your remarks and once in your written remarks, ATF is requesting \$35.6 million for an additional 200 special agents and industry operation investigations through ATF. But my understanding is that ATF is going to have the retirement of

544 special agents this year. They are eligible to retire. I cannot say how many are going to retire. But it certainly appears to me that with ATF being an enforcement agency, you are going to lose people and that that is going to have an unfortunate effect.

Do you have any comment on that?

Attorney General LYNCH. Yes, Senator. Thank you for raising that important issue.

ATF, like so many agencies, is facing a situation where so many of the talented agents are soon able to retire. We certainly hope that they will not, but we know that we will lose some.

I think it is also important to note that the request to would bring an additional 200 agents and investigators on board still would not increase the size of the agency. It is not a request for additional full-time equivalents (FTEs), so to speak, but the budget to hire to fill the existing slots that are vacant now and will be soon be vacant.

Senator FEINSTEIN. Well, let me say this. I speak for a State that is now over 40 million people, by census 39.1 million and probably another 2 million that avoid the census. We want the enforcement of existing law. We want to see that ATF is staffed and able to do it. And this is the subcommittee that is responsible to see that ATF is funded sufficiently to enforce every day laws. So I am going to do everything I can on this committee to see that that amount is raised so that you get the sufficient number. So I would appreciate all of the data that you can provide me with. Thank you.

NATIONAL FIREARMS ACT REGISTRATION

The second thing is machine guns and other fully automatic weapons, as well as weapons like short-barreled shotguns. These are all regulated under the National Firearms Act. And it has been reported that individuals have been able to avoid regulation under the Firearms Act by applying to acquire these dangerous guns through trusts or corporations rather than as individuals. The number of applications for such transfers has increased from fewer than 900 applications in 2000 to more than 90,000 applications in 2014. Now, the trusts are obviously being used not to have to register them or not to have to have a background check or not to have to buy them through a licensed firearm dealer.

So how has ATF managed to keep up with this massive increase in the National Firearms Act (NFA) applications despite flat manpower levels?

Attorney General LYNCH. Well, Senator, the reality is that it is difficult to keep up with those applications. For National Firearms Act weapons, as you indicated, the silencer, short-barrel shotguns, and machine guns, there is an application process similar to a background check, but an application process. And it also typically at this point in time requires what is called a law enforcement officer certification. A local law enforcement officer has to certify the person can do that.

One of the regulations promulgated, after going through the notice and comment period, is a regulation that requires individuals who are seeking to purchase these weapons under the National Firearms Act to undergo a background check, whether they are using a trust or any other legal entity or whether they are a stand-

alone person. Right now, if an individual seeks to purchase the silencer, a short-barrel weapon, they have to undergo an application process similar to a background check. When they use a trust, they do not. The current regulation that has gone through notice and comment, that is being promulgated as a final rule, essentially closes that loophole and says that individuals using a trust or a legal entity stand in the same position as individuals standing alone.

What it also does is removes the law enforcement officer certification requirement because that essentially has been obviated by the background check, and that was an additional delay on the license. So with the information that we are getting from the background checks, individuals, whether they are using a trust, a legal entity, or whether they are applying as individuals, will have the same requirements and undergo the same level of scrutiny before buying a National Firearms Act weapon. And that is one of the rules that was promulgated within this past week as well.

Senator FEINSTEIN. Thank you very much. I am delighted that you are on top of this. Of the 25 attacks, of the more than four people killed in the last 10 years, California has six of them. So I think watching the machine guns and those things that can be used to attack others is really important, and I thank you very much. And I will do everything I can to be of help in seeing that you get more ATF agents.

Attorney General LYNCH. Thank you, Senator.

Senator SHELBY. Senator Boozman.

Senator BOOZMAN. Thank you, Mr. Chairman. And thank you Attorney General Lynch so much for being here today.

Attorney General LYNCH. Good morning, Senator.

Senator BOOZMAN. I have a number of concerns with the way the President continually overreaches his authority, and something that really concerns me is the executive actions in this upcoming rule, a proposal by the Social Security Administration to include folks who have fiduciaries into the NICS program. This is certainly not clarifying existing law. This would prohibit them from the constitutional Second Amendment right, not based on due process but only on the fact that they requested a family member or a friend to assist them with their finances.

MENTAL HEALTH

I am concerned that your Department is fine-tuning or revising some of the definitions regarding being adjudicated as a mental defective and committed to a mental institution to now more broadly cover folks who seek treatment. I am concerned because these were not changed through Congress and now you couple it with the upcoming Social Security rule. What are we going to have?

Please tell me what your Department's plans are here, what is the Social Security Administration planning to do, and who will be entered into the NICS based solely on Social Security records.

Attorney General LYNCH. Senator, thank you for raising that important issue.

As you know, the current Gun Control Act does prohibit individuals who have been adjudicated in certain ways involving their mental health from possessing firearms. And under current law,

Federal agencies are required to submit information to NICS about individuals who fall into those categories: involuntary commitment and adjudications of the type that you were discussing.

The Social Security Administration is beginning a process of seeking comment through a rulemaking process in order to clarify who within the Social Security Administration adjudication system should also fall into that category as well. For example—I will withdraw that because that is not an example. But they currently are not providing the information.

The questions that you raise are very real and salient ones, and the Social Security Administration's process, which is just beginning, is designed to, in fact, solicit comment, to get input as to which types of adjudications should, in fact, be provided to NICS and which should not because, as we know, the issue of mental illness is not one that subjects every individual who has that issue to a prohibition from obtaining a firearm. And so it is important that we clarify, as other agencies have, which types of adjudications and which types of issues would require those records to come to NICS. So the Social Security Administration is beginning that process, and certainly we look forward to providing whatever input and guidance they request from the Department of Justice on that as well.

One of the things that will, of course, be part of that is our Veterans Administration (VA). The VA already provides records. But one of the things that will part of that process is making sure that any individual who may find themselves in that situation receives notice that that is a possibility. That is something that would be consistent with existing law and the Second Amendment, and also that there is a way for an individual to apply to have their rights restored, not just to own and possess a firearm, but anything else that might be a collateral consequence of a particular type of adjudication.

At this point, I cannot predict for you what types of adjudications the Social Security Administration would decide should be provided to the NICS system. We certainly look forward to them going through the comment process and refining that area.

Senator BOOZMAN. Good. Well, thank you, because that really is a real concern.

EQUITABLE SHARING

I have heard from a number of police departments in Arkansas who have had equitable sharing funds recently removed from their accounts due to the Department of Justice's (DOJ) (mis)management of the budget. In a letter from your Department dated December 21st, 2015 regarding the asset forfeiture program, it states that DOJ has already begun implementing cost reduction measures. What are the measures and when do you envision the equitable sharing program to be reinstated? Can you explain the benefits of this program to the American people?

I say this because it is an important program and we are so concerned about violent crime. This is one of the tools that we are using very effectively in order to decrease that and fight that battle.

Attorney General LYNCH. Well, thank you for the question, Senator, because I share your concern and also our regard for the strong working relationship that the Federal Government has with our State and local counterparts. Certainly as a U.S. Attorney, I was a direct beneficiary of their talent and their expertise, and now as Attorney General, I do all I can to keep those relationships strong and vital because they are essential to protecting the American people.

With respect to the equitable sharing issue that you have raised, there had been some budget issues there. There was a rescission from the Department's Asset Forfeiture Fund made in the last fiscal year. I do not know the exact time of it. And that essentially limited our ability to provide funds pursuant to equitable sharing. We are looking forward to restoring those payments as soon as the receipts to the asset forfeiture fund allow. We very much feel that equitable sharing is an important law enforcement tool.

I know that there is a great deal of discussion about asset forfeiture in general. We have been working with Congress to make sure that we retain this important aspect of it while also addressing those concerns as well.

Senator BOOZMAN. Thank you, Mr. Chairman.

Senator SHELBY. Senator Baldwin.

Senator BALDWIN. Thank you, Mr. Chairman and Vice Chairman Mikulski, for holding this important and timely hearing.

Violence continues to plague our communities. In my home State of Wisconsin, gun homicides reached their highest point in a decade last year in the City of Milwaukee. And while we finally saw a notorious gun dealer, once called the number one seller of crime guns in America, start to clean up its act and be held liable for selling firearms used to injure cops, other gun dealers have rushed in to take its place.

I hope that all of my colleagues can agree that we can and must do more, more to address this critical issue and more to keep our communities safe.

Well, I am a gun owner, and I support and respect the Second Amendment. But at the same time, I am very frustrated that the Senate has been unable to advance common sense and bipartisan measures to bolster both the enforcement of our existing gun laws but also to pass additional safety provisions. And in the absence of leadership on this important issue by the Congress of the United States, I have to say I applaud the President for taking the small steps to strengthen the enforcement of existing Federal gun laws.

ILLEGAL GUN SALES

In our limited time, I want to call your attention to two Wisconsin matters, one that I noted in my preface, which is that Milwaukee was home for years to a notorious rogue gun shop, Badger Guns, which in one 2-year period alone was the source of weapons used to shoot and wound six Milwaukee police officers. In 2005, it was the top seller of crime guns in the entire country, according to sources that I have seen. But the shop, which first opened in 1987, had been found in violation of Federal firearms laws by the ATF as early as 1989, and subsequent inspections uncovered additional violations. A 2006 recommendation by Federal investigators that

its license be repealed went unheeded, and it was not until 2011 that the shop lost its ability to sell guns.

Despite an active role by the ATF in monitoring this facility, this store, it clearly put—it was allowed to put guns into the hands of dangerous criminals again and again and again.

So you made it clear in your testimony that the President's actions are not wholesale solutions. We understand that. But I would like to hear from you how the steps that we are discussing today, including support for more ATF personnel, might have helped stop a bad actor like Badger Guns and what more that Congress can do to prevent stores like this from contributing to gun violence.

Attorney General LYNCH. Well, thank you, Senator.

Certainly separate and apart from the recommendations I made to the President, as the subcommittee is aware, it is already a crime to knowingly sell a gun to someone who is prohibited. And what I will say is that ATF is dedicated to enforcing that law as well. And so where there are gun dealers—and it is a very small percentage of them that are in the category that you discussed—ATF does take enforcement actions there. Often the guns through NIBIN or through other means we discover come from the shops, as you mentioned. We learn from investigations of shootings of law enforcement officers, of civilians where the guns tend to come from, and that supports us.

It is impossible to look back, unfortunately, and sort of recreate an investigative trail and say what could or should have been done in that instance because I am not familiar enough with that situation.

What I can say is that as part of the enforcement of the existing laws, ATF takes situations such as you mentioned, very, very seriously. It is, indeed, not the majority of the licensed firearms dealers in America. It is a very small minority of them. But where we find a situation where a gun shop, such as you mentioned, has that type of record, it is something that would be subject to enforcement actions.

Senator BALDWIN. Well, I thank you. Obviously, continuous operation from 1987 to 2011 draws some extremely significant concerns, and so obviously we want to see more swift action in cases like this moving forward.

I have run out of time but hope to submit for the record an additional question regarding an ATF operation in Milwaukee that raised significant concerns in the last couple of years.

Attorney General LYNCH. Thank you, Senator.

Senator SHELBY. Senator Reed.

Senator REED. Well, thank you very much, Mr. Chairman, and thank you, Madam Attorney General, for your leadership and for your testimony this morning.

ACQUISITION OF FIREARMS BY TRUSTS AND CORPORATE ENTITIES

One of the benefits of coming in late is getting to listen to the probing questions of my colleagues, and one of them was Senator Feinstein's question about the trust and corporations that over the last 15 years apparently have been more active in acquiring weapons. And just a few questions.

One is that the proposal by the President would sort of pierce the corporate veil and require the individuals who are actually obtaining these weapons to run a background check. Is that correct?

Attorney General LYNCH. That is correct, sir. Yes, Senator.

Senator REED. And are generally these corporations and trusts set up to avoid limitations on owning automatic weapons, machine guns, or are they applying increasingly with just handguns and what we would consider to be personalized weapons?

Attorney General LYNCH. Well, typically we see trusts and other corporate entities being used to purchase the weapons that are not handguns that typically one can go to a dealer and purchase fairly quickly and easily, but weapons that are under the National Firearms Act. They usually are the short-barrel shotguns, certain types of machine guns, as well as silencers.

Senator REED. It just strikes me somewhat ironically because the Second Amendment is seen—and I think appropriately so—as an individual right that Americans have, and to create corporations and trusts to be—and it is not alone in this area. I happen to have been a lawyer myself for little bit. Corporations and trusts are often created to evade or illegally do something that directly cannot be done. So I think this is a very sensible step and reflects the thoughtful way that you and the President have proposed these very sensible improvements on background checks.

INTERPRETING EXISTING COURT DECISIONS

Another issue that was raised by my colleague from Oklahoma—and a very good one too—is the issue of “engaged in the business.” And from your answer, you rejected a categorical, arbitrary number of weapons, and you reflected the opinions of the courts interpreting the Constitution. I assume that is the rationale, to ensure that this is constitutionally consistent with the court decisions.

Attorney General LYNCH. Yes, Senator. We essentially have crafted the guidance to reflect what the courts have said defines who is engaged in the business of dealing firearms. And the courts have said that there is no set number. Certainly there can be large numbers of firearms transferred, but if someone in fact has a collection and is simply selling that, that would not make them subject to the licensure requirement. But if someone may be selling only a few guns but if they sell them repetitively, they hold themselves out as a dealer, that is a very, very different scenario. Essentially it is not limited to where one operates but to what one does that determines whether one is a dealer or not. So we have collected the guidance based on court cases around the country into a document that we hope will be clear and easily understandable for people who have those questions.

Senator REED. So this is not, as I say, an arbitrary decision. It is a reflection of the courts’ view on the Second Amendment rights of the individual Americans.

Attorney General LYNCH. Yes, Senator.

Senator REED. One other general issue too is that the effect of these regulations overall clearly in a very gross sense two populations of people who are exercising their rights for self-defense, for recreation, for hobbyists, et cetera, and people who are trying to obtain a weapon for illicit purposes. The effect of the President’s reg-

ulations on both groups—my hope is that no impediments for those who honestly seek the legitimate use of firearms with the right to do so and reasonable constraints on those people who have illicit motives. Is that your—

Attorney General LYNCH. That is correct, sir.

Senator REED. Thank you very much, Madam Attorney General.

Attorney General LYNCH. Thank you, Senator.

Senator SHELBY. Senator Murphy.

Senator MURPHY. Thank you very much, Mr. Chairman. Thank you, Attorney General, for being here with us today.

NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM

I wanted to, before I get into a question or two about the guidance, just continue on this line of questioning about resources. I think we talked a lot about ATF resources, but I wanted to explore a little more deeply about resources within the NICS system itself. As we start to game out our budget for the 2016–2017 appropriations year, what should we be looking at in terms of the appropriations necessary for the Department of Justice to be able to do all of the things that we contemplate NICS has to do in order to keep up with the increasing number of applications but also the increased coordination that we want to see to make sure that we have all of the records uploaded onto that system?

Attorney General LYNCH. Yes, Senator. Thank you for that question. I think it is a very timely one as we look to invest in a system that is in fact one of our first lines of defense against keeping guns out of the hands of those who should not have them.

Essentially for fiscal year 2015, NICS performed over 23 million background checks. That number is increasing. In just this December alone, they received over 3 million requests. That is the highest number of requests on a monthly basis since the month after the Sandy Hook shooting.

For fiscal year 2016, our estimates are that we would need \$121 million to run NICS.

We are asking for an additional \$35 million for fiscal year 2017 on top of that base figure. That would allow us to maintain the additional positions we hope to add this year. We may not be able to add all of them right away. As I indicated, there is time required to bring Federal employees on board. It would also help us improve the electronic platform of NICS.

Our goal is to have the NICS system operational on a 24-hour, 7-day a week basis by the end of this year. That will require a great deal of information technology investment and support, but that is our goal.

Senator MURPHY. And for those whose focus is simply on enforcing existing law, that request is based upon your belief that you need that level of appropriations in order to enforce the law that is on the books today.

Attorney General LYNCH. That is correct, Senator. In order to provide for the accurate and efficient operation of the NICS system within the 3-day period that has been set forth by Congress in order to allow us to process the applications in a timely fashion and provide the information that dealers request, that is the basis for this request.

GUIDANCE ON THE INTERPRETATION OF EXISTING LAWS

Senator MURPHY. Mr. Chairman, I hope that we could enter into the record—I do not think it has been done yet, but I would like to enter into the record the actual guidance that is the subject of this hearing, if there is no objection. I wanted to enter the guidance into the record.

Senator SHELBY. Without objection.
[The information follows:]



DO I NEED A LICENSE TO BUY AND SELL FIREARMS?

Guidance to help you understand when a Federal
Firearms License is required under federal law.



The guidance set forth herein has no regulatory effect and is not intended to create or confer any rights, privileges, or benefits in any matter, case, or proceeding, see *United States v. Caceres*, 440 U.S. 741 (1979).

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Introduction

The federal Gun Control Act (GCA) requires that persons who are engaged in the business of dealing in firearms be licensed by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Federal firearms licensees (FFL) are critical partners in promoting public safety because—among other things—they help keep firearms out of the hands of prohibited persons by running background checks on potential firearms purchasers, ensure that crime guns can be traced back to their first retail purchaser by keeping records of transactions, and facilitate safe storage of firearms by providing child safety locks with every transferred handgun and having secure gun storage or safety locks available any place where they sell firearms. A person who willfully engages in the business of dealing in firearms without the required license is subject to criminal prosecution, and can be sentenced to up to five years in prison, fined up to \$250,000, or both.

Determining whether your firearm-related activities require a license is a fact-specific inquiry that involves application of factors set by federal statute. This guidance is intended to help you determine whether you need to be licensed under federal law.

Note that some states have more stringent laws with respect to when a state-issued license is required for selling a firearm. Please consult the laws of the state to ensure compliance.

In addition, this guidance focuses on the question whether your firearm-related activities require you to obtain a license. There are other laws and regulations that govern the transfer of firearms—both between unlicensed individuals and from licensed dealers (e.g., unlicensed sellers may only lawfully sell to persons within their own state, and it is unlawful for either licensed or unlicensed sellers to sell firearms to persons they know or have reasonable cause to believe cannot lawfully possess them). **All persons who transfer firearms, regardless of whether they are engaged in the business of dealing in firearms, must ensure that any transfers are in compliance with federal, state and local laws.**

Key Points

- Federal law requires that persons who are engaged in the business of dealing in firearms be licensed by ATF. The penalty for dealing in firearms without a license is up to five years in prison, a fine up to \$250,000, or both.
- A person can be engaged in the business of dealing in firearms regardless of the location in which firearm transactions are conducted. For example, a person can be engaged in the business of dealing in firearms even if the person only conducts firearm transactions at gun shows or through the internet.
- Determining whether you are "engaged in the business" of dealing in firearms requires looking at the specific facts and circumstances of your activities.
- As a general rule, you will need a license if you repetitively buy and sell firearms with the principal motive of making a profit. In contrast, if you only make occasional sales of firearms from your personal collection, you do not need to be licensed.
- Courts have identified several factors relevant to determining on which side of that line your activities may fall, including: whether you represent yourself as a dealer in firearms; whether you are repetitively buying and selling firearms; the circumstances under which you are selling firearms; and whether you are looking to make a profit. Note that while quantity and frequency of sales are relevant indicators, courts have upheld convictions for dealing without a license when as few as two firearms were sold, or when only one or two transactions took place, when other factors were also present.

If you have any questions about whether you need a license under federal law, we recommend that you contact your local ATF office (<https://www.atf.gov/contact/atf-field-divisions>) to evaluate the facts and circumstances of your particular case.

Legal Framework

Q

Who needs a Federal license to deal in firearms?

A

Under federal law, any person who engages in the business of dealing in firearms must be licensed.

Q

What does it mean to be “engaged in the business of dealing in firearms”?

A

Under federal law, a person engaged in the business of dealing in firearms is a person who “devotes time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.”

Under federal law, conducting business “with the principal objective of livelihood and profit” means that “the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection.”

Consistent with this approach, federal law explicitly exempts persons “who make occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”

Q

Has ATF defined what it means to be “engaged in the business” of dealing in firearms?

A

ATF has published regulatory definitions for the terms “engaged in the business” and “principal objective of livelihood and profit.” ATF’s regulation defining when a person is “engaged in the business” of dealing in firearms is identical to the language of the statute, though in the definition of “dealer,” ATF clarified that the term includes “any person who engages in such business or occupation on a part-time basis.”

Gun Shows, Flea Markets, and Internet Sales

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What if I only sell firearms at flea markets, gun shows or over the Internet?

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A person can be engaged in the business of dealing in firearms regardless of the location in which firearm transactions are conducted. A person can be engaged in the business of dealing in firearms even if the person only conducts firearm transactions from a location other than a traditional brick and mortar store. Many licensed gun dealers conduct business at temporary locations such as qualified gun shows or events, and utilize the internet to facilitate firearm transactions. The question under federal law is not where firearm transactions are conducted, but rather is whether—under a totality of the circumstances—the person conducting those transactions is engaged in the business of dealing in firearms. The factors listed below apply to that determination regardless of where the firearm transactions occur.

The growth of new communications technologies and e-commerce allows sellers of firearms to advertise to an expansive market at minimal cost, and complete sales with minimal effort. While a collector or hobbyist may use the internet and other communication technology to sell a firearm without a license (provided that they comply with all other federal and state laws and regulations), those engaged in the business of dealing in firearms who utilize the internet or other technologies must obtain a license, just as a traditional dealer whose business is run out of a traditional brick and mortar store.

Guidance

A. Overview

What activities require a dealer's license?

Federal law does not establish a "bright-line" rule for when a federal firearms license is required. As a result, there is no specific threshold number or frequency of sales, quantity of firearms, or amount of profit or time invested that triggers the licensure requirement. Instead, determining whether you are "engaged in the business" of dealing in firearms requires looking at the specific facts and circumstances of your activities.

As a general rule, you will need a license if you repetitively buy and sell firearms with the principal motive of making a profit. In contrast, if you only make occasional sales of firearms from your personal collection, you do not need to be licensed. In either case, all of your firearms transactions are relevant, regardless of their location; it does not matter if sales are conducted out of your home, at gun shows, flea markets, through the internet, or by other means.

As a general rule, you will need a license if you repetitively buy and sell firearms with the principal motive of making a profit. In contrast, if you only make occasional sales of firearms from your personal collection, you do not need to be licensed.

B. Factors Identified by Federal Courts

Federal courts have identified several factors that can help you determine on what side of that line your activities fall. They include: whether you represent yourself as a dealer in firearms; whether you are repetitively buying and selling firearms; the circumstances under which you are selling firearms; and whether you are looking to make a profit. It is important to note that no single factor is determinative, and that the relative importance of any of the factors will vary depending on the facts and circumstances applicable to the individual seller.

Relevant factors: whether you represent yourself as a dealer in firearms; whether you are repetitively buying and selling firearms; the circumstances under which you are selling firearms; and whether you are looking to make a profit.

- **Are you representing yourself as a dealer in firearms?**

Perhaps the clearest indication of whether a person is "engaged in the business" of dealing in firearms can be found in what he or she represents to others. Some factors that may demonstrate that you intend to engage in the business of dealing in firearms include: representing yourself as a source of firearms for customers, taking orders, and offering to buy firearms to immediately resell. Your intent to engage in the business of

Guidance (continued)

dealing in firearms can also be reflected by undertaking activities that are typically associated only with businesses—for example, creating a business entity or trade name for your firearms business, securing State and local business licenses to sell items that may include firearms, purchasing a business insurance policy or rider to cover a firearms inventory, commercial advertising, printing business cards, and accepting credit card payments.

- *Are you repetitively buying and selling firearms?*

As noted above, there is no specific threshold number of firearms purchased or sold that triggers the licensure requirement. Similarly, there is no “magic number” related to the frequency of transactions that indicates whether a person is “engaged in the business” of dealing in firearms. It is important to note, however, that even a few firearms transactions, when combined with other evidence, can be sufficient to establish that a person is “engaged in the business” of dealing in firearms. For example, courts have upheld convictions for dealing without a license when as few as two firearms were sold, or when only one or two transactions took place.

That said, courts have looked at both the quantity of firearms sold, as well as the frequency of sales, as relevant indicators. When combined with other factors, selling large numbers of firearms or engaging in frequent transactions may be highly indicative of business activity.

- *What are the circumstances under which you are selling firearms? Are you selling shortly after acquiring them? Repeatedly selling the same type of firearm? Or repetitively selling new firearms?*

In addition to the volume and frequency of firearms transactions, the timing and circumstances surrounding firearm transactions are also significant indicators of whether a person is engaged in the business. Repetitively selling or offering to sell firearms shortly after they are acquired; “restocking” inventory; repetitively acquiring the same type of firearm or a large quantity of the same type of firearm, and then reselling or offering to sell those firearms; and/or repetitively acquiring and reselling or offering to sell firearms in unopened or original packaging (or in new condition), are all factors which individually or combined may indicate a person is engaged in the business.

- *Are you looking to make a profit?*

As noted above, if you are repetitively buying and selling firearms “with the principal objective of livelihood and profit,” you must be licensed. Because the key is *intent or objective*, the courts have made clear that a person can be “engaged in the business” of dealing in firearms without actually making a profit. In determining that intent or objective, courts have looked to prices that an unlicensed seller charges for firearms to determine if the principal objective of the seller is livelihood and profit. In some cases, prices reflect appreciation in actual market value resulting from having held a

Guidance *(continued)*

firearm as part of a collection, or reflect a profit intended to be used to acquire another firearm as part of a collection. As a result, the fact that a transaction results in a profit for the seller is not always determinative.

Finally, it is important to note that courts have found that you can buy and sell firearms “with the principal objective of livelihood and profit” even if your firearm-related activities are not your primary business. In other words, you can still be “engaged in the business of dealing in firearms with the principal objective of livelihood and profit” if you have a full time job, and are buying and selling firearms to supplement your income. ATF regulations specifically note that the term “dealer” includes a person who engages in such a business or occupation on a part-time basis.

Does a Curio and Relics Collector's license (C&R license) allow me to be engaged in the business of dealing in firearms?

The C&R license does not allow for the licensee to repetitively buy and sell firearms with the principal motive of making a profit. It does not matter if the firearms being bought and sold are curios or relics, or newer firearms. If a C&R licensee wishes to engage in the business of dealing in firearms, he or she must apply for a different type of license that allows this activity.

Do I need a license if I'm an auctioneer and simply auction guns for my customers?

If you repeatedly conduct auctions for firearms that are first consigned to you for sale, and you intend to make money from those sales, you need a license. If, however, you simply offer auctioneer services without having the firearms transferred to you (for example, you are hired by the representative of an estate to travel to the location of the estate, assist the estate in conducting an auction, and the firearms remain the property of the estate until transfer to the buyer), you need not be licensed.

Examples

While the determination of whether a person requires a federal firearms license is highly fact-specific, the following examples are provided to show how the factors identified by federal courts apply to common fact patterns. **Of course, the existence or absence of other facts not included in the examples may change the conclusion as to whether a person is engaged in the business and therefore must be licensed; hence, these examples are provided solely as general guidance.** For the purposes of these examples, assume that the sellers comply with all other relevant federal and state laws and regulations (for example, any unlicensed person makes only lawful sales to persons who reside in the same state).



Bob inherits a collection of firearms from his grandfather. He would rather have cash than the firearms, so he posts them all online for sale. He makes no purchases, but over the course of the next year he sells all of the firearms he inherited in a series of different transactions. Bob does not need a license because he is liquidating a personal collection.



Joe recently lost his job, and to finance his living expenses he has been buying firearms from friends and reselling them through an internet site. He has successfully sold a few firearms this way, and has several more listed for sale at any one time. Joe must be licensed because he is repetitively buying and selling firearms with the primary objective of profit.



Sharon travels to flea markets the first Saturday of every month, buying undervalued goods, including firearms. The last Saturday of every month Sharon rents a booth at the flea market and sells her items at market value for a profit. She hopes to make enough money from these sales to finance a trip to Italy next year. Sharon must get a license because she is repetitively buying and selling firearms with the primary objective of profit.



David enjoys hunting and has a large variety of hunting rifles. He likes to have the newest models with the most current features. To pay for his new rifles, a few times a year David sells his older weapons to fellow hunters for a profit. David does not need to be licensed because he is engaging in occasional sales for enhancement of his personal collection.



Lynn regularly travels to gun shows around her state, rents space, and sells firearms under a banner stating "liquidating personal collection." Most of the firearms Lynn offers for sale she purchased from a licensed dealer in the prior weeks. Lynn is retired and hopes to supplement her income with the money she makes on the sales, although she has yet to turn a profit. Lynn must get a license because she is repetitively buying and selling firearms with a primary objective of profit.

Examples (continued)



Scott has been collecting high-end firearms for years. In the six months before his son is about to enter college, Scott sells most of his collection in a series of transactions at gun shows, on the Internet, and to family and friends to provide funds to pay his son's college expenses. Scott does not have to be licensed, because he is liquidating part of a personal collection.



Debby has three handguns at home, and decides that she no longer wants two of them. She posts an advertisement in the local newspaper and sells the two handguns to a local collector. Debby does not need a license because she is not engaging in the repetitive purchase and resale of firearms as a regular course of trade or business.



Jessica enjoys shooting sports and frequently goes to shooting ranges and hunting clubs. To make some extra money, she buys firearms from a dealer who is willing to give her a discount, and resells them for a profit to acquaintances from the shooting ranges and hunting clubs. She has done this a few times a month for the last several months, and has been spreading the word that she has a source for other firearms. She passes out business cards with her name, phone number and email. Jessica must get a license because she is repetitively buying and selling of firearms with the primary objective of profit.



Doug regularly attends gun shows and rents a table to display firearms for sale. He gets firearms from a variety of sources, carefully logs each purchase into a book, and uses the purchase price to set a sales price that will realize him a net profit. Doug accepts credit card payments and typically sells multiple firearms at each of the gun shows he attends each year. He makes a substantial amount of money annually, and uses this money to live on. Doug must be licensed because he is repetitively buying and selling firearms with the primary objective of profit.

Questions & Answers On Getting A Federal Firearms License

Q

A

How do I become licensed?

The license application (called the ATF Form 7) is straightforward and can be found here: <https://www.atf.gov/firearms/apply-license>. In addition to the application itself, an applicant for a federal firearms license must also provide to ATF a photograph, fingerprints, and the license application fee, currently set at \$200 for the initial three-year period, and \$90 for each three-year renewal.

Q

A

What standards does ATF use to determine whether to give me a license?

ATF will approve an application for a federal firearms license if the applicant:

- Is 21 years of age or older;
- Is not prohibited from shipping, transporting, receiving or possessing firearms or ammunition;
- Has not willfully violated the GCA or its regulations;
- Has not willfully failed to disclose material information or willfully made false statements concerning material facts in connection with his application;
- Has a premises for conducting business; and
- The applicant certifies that:
 - the business to be conducted under the license is not prohibited by State or local law in the place where the licensed premises is located;
 - within 30 days after the application is approved the business will comply with the requirements of State and local law applicable to the conduct of the business;
 - the business will not be conducted under the license until the requirements of State and local law applicable to the business have been met;
 - the applicant has sent or delivered a form to the chief law enforcement officer where the premises is located notifying the officer that the applicant intends to apply for a license; and
 - secure gun storage or safety devices will be available at any place in which firearms are sold under the license to persons who are not licensees.

Q

A

What obligations will I have once I become licensed?

Licensed firearms dealers are subject to certain requirements under federal law, including running background checks on any non-licensed person prior to transferring a firearm (subject to narrow exceptions), keeping firearms transaction records so that crime guns can be traced to their first retail purchaser, and ensuring safety locks are provided with every handgun, and available in any location where firearms are sold.

Questions & Answers On Getting A Federal Firearms License *(continued)*

Licensees are also prohibited by law from knowingly transferring handguns to persons who do not reside in the State where the licensee's premises are located, and from knowingly transferring any firearm to underage persons and certain categories of "prohibited persons," including felons, persons who were involuntarily committed to mental institutions, and illegal aliens. Under federal law, licensees are subject to inspection and are also required to respond to requests for firearms tracing information within 24 hours.

This list is not all inclusive; more information about the requirements of having a federal firearms license can be found at www.ATF.gov and by contacting your local ATF Office. A list of local offices can be found at <https://www.atf.gov/contact/atf-field-divisions>.



What if I don't need to be licensed, but I want to make sure a background check is run on a potential purchaser of my gun?



Private, unlicensed sellers can help ensure that potential purchasers are not prohibited from possessing firearms by using a licensed dealer to facilitate the sale and transfer of a firearm. For a small fee, many licensed dealers will facilitate a sale of a firearm between two unlicensed individuals. This service provides both customers and the community assurance that individuals who want to purchase firearms undergo a comprehensive background check which helps to ensure the buyer is not prohibited from possessing a firearm, and can improve the ability of law enforcement to trace firearms if they are later recovered in a connection with a crime. In 2013, ATF published an open letter (<https://www.atf.gov/file/56331/download>) to licensed dealers educating them on how to facilitate private sales, and published ATF Procedure 2013-1 (<https://www.atf.gov/file/88181/download>), which provides further guidance. The decision to facilitate private sales is wholly voluntary on the part of the licensed dealer.

Additional information can be found at www.atf.gov.

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives
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Washington, DC 20226



Senator MURPHY. Thank you, Mr. Chairman.

You know, I would hope that those that have an opinion, especially those that have a strong opinion, on this guidance would actually take the time to read it because our second panel is going to include individuals who are going to call it an unwarranted assault on the Second Amendment, an effort to intentionally intimidate and harass law-abiding citizens. There will be those that call it patently unconstitutional. I hope people will read through what this guidance actually says.

In summary, it is five points.

One, that the Federal law requires that persons who are engaged in the business of dealing in firearms be licensed by the ATF. That is a simple recitation of existing law.

Second, that you can be engaged in the business of dealing in firearms regardless of the location in which the firearm transaction is conducted. I am not sure that anyone would dispute that fact.

Third, that determining whether you are engaged in the business requires you to look at specific facts and circumstances of your activities. Again, that seems patently clear.

Fourth, that as a general rule, you need a license if you repetitively buy and sell firearms with the principal motive of making a profit, but if you only make occasional sales of firearms, you do not need to be licensed, a clear restatement of existing law.

And then fifth, a simple explanation about what existing courts have already said to interpret the law.

And so to the extent that a lot of the objections may be over this fifth key point, let me just ask you to state clearly for the record. This fifth point on your page of key points—that is simply a recitation of existing court interpretations of the underlying law. There is nothing in there that is a new statement of law. That simply summarizes what existing courts have found relative to who is required to have a license.

Attorney General LYNCH. That is correct, Senator.

Senator MURPHY. And currently there is a difference of opinion. There have been different interpretations by different courts as to the interpretation of that law.

Attorney General LYNCH. Yes, Senator. That is also correct.

Senator MURPHY. And so for those who are trying to determine whether they fall under the law or not, the existing court precedent may be confusing or sometimes hard to track down.

Attorney General LYNCH. Yes, it is. It is often hard to track down. And also, it is a lot to ask the average citizen to do a Lexis/Nexus search and do legal research and determine what the courts have said about how they are operating. And in fact, what often happens is that individuals who are operating either at gun shows or smaller sales or even out of other locations will reach out to ATF and they have questions. They say, “this is what I am doing and I do not know if it means whether I need to apply for a license or not.” They ask those questions in person when they see the investigators at gun shows. They call in with those questions.

And so our hope is that this guidance, along with the educational program that ATF will be beginning, which is providing the information to people to allow individuals to have some clarity about this issue. We do not assume that everyone is a lawyer or even

wants to be. But they do have this requirement if they are engaged in the business of dealing in firearms. And it is our hope that this will ease compliance for those individuals who are, in fact, seeking to comply with the law.

And for those individuals who have no intention of complying with the law, this will put them on notice and will remove the defense that “this is too confusing” or “I had no idea that I was falling in this category.”

It also allows people who are hobbyists and collectors to gain clarity as well about their position because they need not apply for a license.

Senator MURPHY. Thank you, Mr. Chairman.

Senator SHELBY. Thank you.

We have reached the point of basically concluding our first panel. Any subcommittee members who have additional questions for the Attorney General may submit them for the official hearing record, and we would request, Madam Attorney General, that the Department of Justice provide responses within 30 days. You generally do. Thank you.

Senator MIKULSKI. Mr. Chairman, I am sorry. Go ahead.

Senator SHELBY. Thank you for your appearance here today, for your time.

Senator Mikulski.

Senator MIKULSKI. Mr. Chairman, I must excuse myself from the second panel. I have several Maryland constituents that we scheduled to meet on the issue of hate crimes, for which they have been targeted. I need to participate in that.

I want to welcome the witnesses to the second panel. I have already read their testimony. A particular acknowledgement for Mr. Barden and what he brings to the table, as well as the other practitioners of law. And we look forward to really moving on this agenda to resource the agencies to enforce the laws we have on the books and to find common ground on the President’s executive orders.

Senator SHELBY. Thank you, Senator.

As the Attorney General departs here, I invite our second panel of witnesses to join us at the table.

Senator MIKULSKI. Mr. Chairman, Senator Murphy will sit in my stead at the committee.

Senator SHELBY. Thank you.

As our second panel settles in, I would like to make some brief introductions for the next four witnesses.

First, I welcome the Honorable Luther Strange, Attorney General from my State of Alabama. Attorney General Strange is recognized as a national leader in advancing the causes of Federalism and a limited government by fighting the increasing unconstitutional overreach of the Federal Government and its assault on individual liberty.

He currently serves on the Executive Committee of the Republican Attorney Generals Association. He is also the chairman of the southern region of the National Association of Attorneys General.

Next we will be joined by the Honorable Ken Cuccinelli, the former Attorney General of Virginia. In that role, he challenged many of the Federal Government’s attempts to overreach its con-

stitutional powers. Today as a private attorney with over 20 years of experience as a litigator, Mr. Cuccinelli now serves as a founding partner and attorney for the United Self Defense Law Firm.

Third, we welcome Mr. Mark Barden, the founder and managing director of Sandy Hook Promise, a national nonprofit organization founded and led by several family members whose loved ones were killed at Sandy Hook Elementary School on December 14, 2012. After tragically losing his son Daniel that day, Mr. Barden has dedicated himself to bringing people together to find sensible solutions that will prevent future tragedies and spare other families the pain of losing a child to gun violence.

Finally, we will have Dr. Joyce Lee Malcolm joining us today from George Mason University School of Law where she works as the Patrick Henry Professor of Constitutional Law and the Second Amendment. Dr. Malcolm is a historian and constitutional scholar active in the area of constitutional history focusing on the development of individual rights in Great Britain and America. She has written numerous books and articles on gun control, the Second Amendment, and individual rights.

Professor Malcolm has previously taught at Princeton University, Bentley College, Boston University, Northeastern University, and Cambridge University.

I want to thank all of you for joining us here today, and we will start with Attorney General Strange. Welcome to the committee.

STATEMENT OF HON. LUTHER STRANGE, ATTORNEY GENERAL, STATE OF ALABAMA

Mr. STRANGE. Thank you, Senator Shelby, Senator Murphy. I thank Vice Chairman Mikulski as well for inviting me here today. I am honored to accept your invitation to speak about an issue of importance to all Americans, reducing gun violence while ensuring that the fundamental right of law-abiding citizens to bear arms is not infringed.

I wish to commend your subcommittee for convening this panel to explore how best to balance these goals because they are not mutually exclusive.

My duty as Attorney General is to enforce the law, and I am here today as the chief law enforcement officer to deliver the man on the street, the law enforcement officers on the streets perspective on this issue. For the last 5 years, I have witnessed firsthand as Attorney General the challenge of safeguarding the gun rights of law-abiding citizens while also working to deny law breakers the ability to use firearms to commit crimes.

In those 5 years, I have learned an important lesson. Further limiting the ability of responsible citizens to buy a gun will not keep criminals from getting one.

In fact, after I learned I would be testifying before this committee, I reached out to local police chiefs soliciting their advice on what is working and what is not working in stopping gun violence on the street. I wanted to be able to carry their message, based on decades of experience on the front lines of this fight, to this committee. These are the men and women who are the first line of defense or the first people on the scene of a terrorist attack or a vio-

lent event, active shooter situation. Again and again, I heard the same thing from these men and women.

Number one, enforce the laws already on the books.

Number two, prosecute criminals for gun-related crimes.

Number three, stop releasing violent criminals from jail before their sentences are completed.

They directed their concerns squarely at the Federal Government which they see as failing to uphold its commitment to hold criminals accountable for gun crimes. And they have their doubts about the promises they hear coming out of Washington.

As one police chief put it, "If anyone of any political stripe whatsoever was sincerely concerned about gun violence, they would take a no-holds-barred approach to enforcing the seemingly endless laws relating to guns that are already on the books."

I do not think there is anyone in America whose heart does not break over the news of mass shootings that take innocent lives. There is no one in this country who opposes making our streets safer. We all want to do everything we can to prevent more gun crimes. But we also must be sure that political actions taken in the name of solving the problem are grounded in facts. They must be vetted by representatives of the American people and they must not undermine our constitutional rights.

Two weeks ago, the President announced a series of executive actions he asserted would reduce gun violence. And while he may have had the best of intentions, the law enforcement officers in my State and I dare say around the country believe these actions will not have a meaningful impact.

The centerpiece of the President's order, expanding background checks to close what some would call the gun show loophole, is not only an unwarranted assault on the Second Amendment, but it also will be ineffective in making a significant contribution toward reducing overall gun crimes. It will be ineffective because less than 1 percent of illegal gun purchases are determined to come from gun shows and fewer still are involved in violent crimes.

It is our goal to reduce crime and to make our streets safer. The President's actions will not accomplish that.

The only practical impact of the President's gun show provision in my view will be to intimidate or frighten law-abiding citizens so that they will refrain from selling their guns at all for fear they will be prosecuted for failure to register as a firearms dealer.

So instead of new rules and regulations, a better approach would be to enforce the laws we have by increasing the efficiency of and funding for the existing National Instant Check System, the NICS system. It is critical to ensuring that guns do not end up in the wrong hands. And I think that is the sentiment shared by all the members of the committee on both political sides. We can do better with that system. With more funding and support, the States can ensure that every felony conviction is reported to the system because if the information is not in the system, the system cannot work. And just as importantly, when the system does work, we find felons attempting to buy guns and we prosecute them.

Using the same laws that are on the books today, the Bush administration secured 35 percent more Federal gun convictions in 2004 and 2005 than the Obama administration did in 2014. With

the exception of a slight uptick in 2012, Federal gun convictions have fallen every year President Obama has been in office. If we are not enforcing our laws intended to keep criminals from getting guns, then adding new executive orders on top of those laws, even if well designed, will accomplish nothing.

At the same time, the Federal Government must do more to provide law enforcement tools they need to do their job. And I hear from sheriffs, including a friend from the State of Alabama, who I am sure you are familiar with, the sheriff of Calhoun County, former president of the National Sheriffs' Association, who told me what he needs is more resources from the Federal Government, not fewer. In fact, he has recently suffered the loss of assets to protect his officers in very dangerous situations.

So we can do more. Remember the sacrifice of our men and women in law enforcement. I think sometimes we lose sight, particularly here in Washington, of the acts of a few that tar the whole, and we need to support our men and women in blue.

I have had the sad duty, as I know you have, Senator, and I am sure Senator Murphy and other members of this committee, to attend the funerals of officers who have fallen in the line of duty either through the result of a criminal, a mentally ill person, or a gang member, et cetera. Mental illness is a tremendous concern, and I applaud President Obama for focusing on the mental illness issue. My concern is that it should not be done in the manner that he is doing it, but rather should be debated by Congress and this committee to be done in a thoughtful, thorough way.

And in conclusion, what we do not want to see, if I may, Senator, is a veteran coming back from Iraq or Afghanistan who has concerns, wants to talk to a counselor, and finds himself unable to purchase a gun. The same thing for someone who may turn over his affairs to a family member to handle and ends up losing their Second Amendment rights.

So I thank you again for allowing me to be here. Our Second Amendment rights can be protected at the same time we keep Americans safe. Thank you.

[The statement follows:]

PREPARED STATEMENT OF HON. LUTHER STRANGE

Chairman Shelby, Vice Chairman Mikulski, and members of the Senate CJS subcommittee, I am honored by your invitation to speak today about an issue of importance to all Americans—reducing gun violence while ensuring that the fundamental right of law-abiding citizens to bear arms is not infringed.

I wish to commend your subcommittee for convening this panel to explore how best to balance these goals. They are not mutually exclusive.

My duty as attorney general is to enforce the law. I don't have the ability to pick and choose which laws to uphold because of political pressure or personal preference. As the chief law enforcement official of the State of Alabama for the last 5 years, I have witnessed firsthand the challenge of safeguarding the gun rights of law abiding citizens while also working to deny law breakers the ability to use firearms to commit crimes.

And in those 5 years I have learned an important lesson. Further limiting the ability of responsible citizens to buy a gun will not keep criminals from getting one.

In fact, after I learned I would be testifying before this subcommittee, I reached out to local police chiefs soliciting their advice on what is working and what is not in stopping gun violence on the street. I wanted to be able to carry their message, based on decades of experience on the front lines of this fight, to this subcommittee. Again and again, I heard the same thing.

- Enforce the laws already on the books
- Prosecute criminals for gun-related crimes
- Stop releasing violent criminals from jail before their sentences are completed

They directed their concerns squarely at a Federal Government which they see as failing to uphold its commitment to hold criminals accountable for gun crimes. And they have their doubts about the promises they hear coming out of Washington.

As one police chief put it, “If anyone of any political stripe was sincerely concerned about gun violence they would take a no-holds-barred approach to enforcing the seemingly endless laws relating to guns that are already on the books!”

I don’t think there is anyone in America whose heart doesn’t break over the news of mass shootings that take innocent lives. There is no one in this country who opposes making our streets safer. We all want to do everything we can to prevent more gun crimes. But we must also be sure that political actions taken in the name of solving the problem are grounded in facts. They must be vetted by representatives of the American people, and they must not undermine our constitutional rights.

Three weeks ago President Obama announced a series of Executive actions he asserted would reduce gun violence. But while he may have the best of intentions, the law enforcement officers in my State tell me these actions will have not have a meaningful impact.

The centerpiece of the president’s order—expanding background checks to close what some call the gun show loophole—is not only an unwarranted assault on the Second Amendment, but it will also be ineffective in making a significant contribution toward reducing overall gun crimes.

It will be ineffective because less than 1 percent of illegal gun purchases are determined to come from gun shows and fewer still are involved in violent crimes. If our goal is to reduce crime and make our streets safer, the President’s actions will not accomplish it.

The only practical impact of the President’s gun show provision will be to intimidate and frighten law abiding citizens so that they will refrain from selling their guns at all for fear they will be prosecuted for failure to register as a firearms dealer.

Instead of new rules and regulations, a better approach would be to enforce the laws we have by increasing the efficiency of and funding for the existing National Instant Check System. The NICS system is critical to ensuring that guns don’t end up in the wrong hands. And yet we can do better. With more funding and support, States can ensure that every felony conviction is reported to the system. Because if the information isn’t in the system, the system can’t work. And just as importantly, when the system does work and we find felons attempting to buy guns, we must prosecute them.

Using the same laws which are on the books today, the Bush administration launched the Project Safe Neighborhoods initiative, a program piloted in Richmond by now FBI Director James Comey. That program had a zero-tolerance, must prosecute requirement for felons caught in possession of a firearm. Because of this program, the Bush administration secured 35 percent more Federal gun convictions in 2004 and 2005 than the Obama administration did in 2014. With the exception of a slight uptick in 2012, Federal gun convictions have fallen every year President Obama has been in office.

There’s a lesson there. If we are not enforcing our laws intended to keep criminals from getting guns, then adding new Executive orders on top of those laws, even if well-designed, will accomplish nothing.

At the same time, the Federal Government must do more to provide law enforcement the tools they need to do their jobs. We need a Federal-State partnership, whether it is through increased training, access to better equipment, or simply providing funding to prosecute crimes.

I recently heard from Calhoun County Sheriff Larry Amerson, former president of the National Sheriffs’ Association and one of the finest law enforcement officers in Alabama. Too many times, he’s had to visit officers in the hospital with gunshot wounds or attend funerals of officers killed in the line of duty. He knows the importance of this issue. And his message to this subcommittee is give officers the tools they need to do their jobs. Recent actions here in Washington have prevented Sher-

iff Amerson from getting the equipment he needs to keep his officers safe. He wrote to me, "Now we have no protection. We cannot even get surplus military helmets."

Finally, we need to do more at the State and Federal level to address issues related to mental health. While I may not agree with the approach, I was glad to see that President Obama made a focus on mental health a priority in his Executive actions. There is no doubt that mentally ill individuals have been responsible for many violent gun crimes in our country and they represent a particular threat to law enforcement who often are unaware of their condition. I've seen it firsthand.

In 2012, I attended the funeral of a Baldwin County, Alabama Sheriff's deputy who lost his life in the line of duty. He had responded to a call in which a mentally ill man was acting aggressively toward family members. He pulled a gun and fired on two deputies, killing one and wounding the other.

But while mental illness is a serious concern, it is a problem that cannot be addressed through an Executive order. There is no quick fix. We must ensure that while instituting any enhanced reporting requirements that we do not deny the constitutional rights of those who might not truly be mentally incompetent. Instead, there should be a procedure in place to protect the rights of the mentally ill while ensuring that they are not a danger to themselves or society.

And we must ensure that in focusing on mental illness, we do not inadvertently discourage people from seeking help for their problems. For instance, a soldier who returns home from war should not lose the right to bear arms that he fought to defend simply because he seeks help for post traumatic stress disorder (PTSD) or other psychological problems. A person on Social Security should not lose their right to bear arms simply because they decide to assign a family member or friend to handle their affairs. These are the subtle nuances that any attempt to address this problem will bring. And to handle them correctly will require a bipartisan effort, led and debated here in Congress.

In summation, Mr. Chairman, I join a majority of Americans in supporting legitimate efforts to curb gun violence in our land. I also follow the recommendations of law enforcement in my State that the most effective way to address gun crimes is to enforce the abundant existing laws we already have, while giving law enforcement the tools they need to do their jobs. As Sheriff Amerson has said, "Many people opposed to more gun laws support enforcing existing laws. Why not try it?"

Americans' right to bear arms should be protected and we can do that and protect Americans from gun crimes by enforcing the law.

Thank you.

Senator SHELBY. Mr. Cuccinelli.

STATEMENT OF HON. KEN CUCCINELLI, FORMER ATTORNEY GENERAL, COMMONWEALTH OF VIRGINIA; FOUNDING PARTNER AND ATTORNEY, UNITED SELF DEFENSE LAW FIRM

Mr. CUCCINELLI. Mr. Chairman, members of the subcommittee, in addition to being a former Attorney General and a current Second Amendment lawyer, I also spent 12 years working in the mental health arena as an attorney. So I have that perspective as well. And I would say that nothing, not one thing, in the President's executive actions related to guns that we are discussing today would have any meaningful effect on tragedies like Virginia Tech in my State or San Bernardino, much less more common gun-related street crime.

However, the President's focus on improving mental health care does have the potential to assist in avoiding future tragedies, particularly given that over 60 percent of all gun deaths are mental health-related.

There are two basic categories of actions advanced by President Obama in his recent executive actions, those relating to guns in law enforcement and those relating to mental health.

Everything the President advocates costs money. So let me begin by saying—I am a lawyer, so I have to start with my caveat. Right? That it would be my strenuous hope that given the fact that our national government is astonishingly bankrupt, not merely bank-

rupt, that this Congress would cut more money than it proposes to spend on any of these programs. Presumably you would cut lower priority expenditures if you decide that funding more FBI agents or mental health care is of greater importance, as I hope you will.

The President's actions directed at stemming gun violence appear to be in some cases merely aspirational and in other cases intentionally intimidating and harassing of law-abiding citizens in an effort to get them to shy away from selling guns that they legally own.

The procedural proposals to more quickly and smoothly run background checks and more accurately are unarguable so long as they are paid for. All of us want the laws on the books to be enforced, and if that can be done more efficiently and effectively than we are doing today, that would be wonderful.

However, when the President and the Attorney General seek to intentionally create confusion and ambiguity about when someone selling a single gun might be in violation of the law with 5-year jail penalties, one can only call that dishonorable intimidation of the citizenry by its government.

I would note that this jail threat includes a problem found across the entire universe of Federal regulatory law. Mainly there is no clear mens rea requirement, no necessity for a finding of culpable intent on the part of the hypothetical offender citizen. This is another of a long list of examples of Presidents, plural and bipartisan, expanding Federal power using regulatory bodies that have been imbued with criminal law-making authority. Now our President wants Federal law enforcement authorities to crack down on people selling as few as one gun by forcibly classifying them as gun dealers. This is obviously ludicrous, but the President and Attorney General do not seem to care.

Please remember to put yourself in the position of the individuals involved. From an individual citizen's perspective, having your own Federal Government simply investigating you to make sure one gun sale that you conducted privately and innocently, perhaps to then use the money to go buy a different gun, for example—very common—is an excruciating and painfully expensive experience fraught with peril.

And that is exactly how the President wants it. His rhetoric surrounding the release of his proposed actions makes it very clear that while he cannot do much, he can threaten much, and that he intends his bureaucracy to torment many of my fellow citizens who also happen to be gun owners.

As a lawyer who has worked on hundreds of mental commitment cases and been deeply involved in how my own community's mental health care system interacts with the judicial system, I would urge efforts to improve mental health care at the State and local level to address some of the problems of violence in this country. The Federal Government's role in such efforts should be purely supportive, as this is one of many types of challenges best addressed at the local level.

In addition to the dearth of mental health care available throughout most of our country, as it relates to public safety, we have a challenging balance to strike between patient privacy and liberty, public safety, and yes, liability.

It would be my hope that the Federal Government would do two things and only two things in the area of mental health: first, provide funding to expand mental health care in the States by cutting lower priority programs in the Federal Government; and second, get out of the way of the States. Eliminate all of your Federal rules and requirements and trust the States to find ways to provide better and more cost-efficient care over time. They do want to do it.

Other than providing funding for mental health care, the President vaguely mentioned the Department of Health and Human Services removing barriers to States reporting information about people disqualified from purchasing guns due to mental health reasons. I would urge this subcommittee to go much further and urge HHS to cut back and simplify the Health Insurance Portability and Accountability Act (HIPAA) more generally as the impediments to basic, though protected, information sharing cause significant problems and inefficiencies.

In the case of the Virginia Tech tragedy, the shooter's Virginia public high school, which I represented at the time in the Virginia State Senate, had figured out how to manage the shooter's mental health issues, but they were not allowed to talk to Virginia Tech about the subject. Thus, Virginia Tech did not even know they had a seriously mentally ill student when Cho, the shooter, arrived as a freshman. While we fixed that under Virginia law, such opportunities for improved information sharing exist throughout our legal system.

I will finish by calling your attention to very serious concerns I have about threats to due process rights referenced in the President's rhetoric. And when I say "referenced," I mean his threats—not the due process rights. I did not hear them referenced.

The other concern at a constitutional level, because I see time is out, that I have is beyond the Second Amendment, beyond due process, is the separation of powers. I heard one Senator here already say, gosh, if the Congress will not cooperate with the President, I am sure glad the President is bypassing Congress. Actually a lack of cooperation is a decision by the Congress not to change the law. And I have yet to hear a Senator or a witness say that the law should be anything other than enforced as it is written.

Thank you.

[The statement follows:]

PREPARED STATEMENT OF HON. KEN CUCCINELLI

Opening statement before the U.S. Senate Committee on Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies regarding the President's recently announced Executive actions related to gun violence of Kenneth "Ken" Cuccinelli, II, 46th Attorney General of Virginia and current partner in the Second Amendment law firm of United Self Defense Law, PLLC.

Nothing—not one thing—in the President's Executive actions *related to guns* that we are discussing today would have any meaningful effect on tragedies like Virginia Tech in my State or San Bernardino, much less more common gun-related street crime. However, the President's focus on improving *mental healthcare* does have the potential to assist in avoiding future tragedies, particularly given that over 60 percent of all gun deaths are mental-health related.

There are two basic categories of actions advanced by President Obama in his recent Executive actions, those relating to guns and law enforcement, and those relating to mental healthcare.

Everything the President advocates costs money, so let me begin by saying that it would be my strenuous hope that, given the fact that our National Government

is astonishingly bankrupt, that this Congress would cut more money than it proposes to spend on any of these programs. Presumably you would cut lower priority expenditures if you decide that funding more FBI agents or more mental healthcare is of greater importance, and I would urge you in the strongest possible terms to do exactly that.

The President's actions directed at stemming gun violence appear to be in some cases merely aspirational, and in other cases intentionally intimidating and harassing of law-abiding citizens in an effort to get them to shy away from selling guns that they legally own.

The procedural proposals to more quickly and smoothly run background checks are unarguable, so long as they are paid for. All of us want the laws on the books to be enforced, and if that can be done more efficiently and effectively than we are doing today, that would be wonderful.

However, when the President (and the Attorney General) seek to intentionally create confusion and ambiguity about when someone selling a single gun might be in violation of a law with 5 year jail penalties, one can only call that dishonorable intimidation of the citizenry by its Government.

I would note that this jail threat includes a problem found across the entire universe of Federal regulatory law, namely, there is no clear *mens rea* requirement—no necessity for a finding of culpable intent on the part of the hypothetical offender/citizen. This is another of a long list of examples of Presidents (plural and bi-partisan) expanding Federal power using regulatory bodies that have been imbued with criminal law-making authority. Now our President wants Federal law enforcement authorities to “crack down” on people selling as few as one gun by forcibly classifying them as “gun dealers.” This is obviously ludicrous, but the President and Attorney General don't seem to care.

Please remember to put yourself in the position of the individuals involved. From an individual citizen's perspective, having your own Federal Government simply investigating you to make sure one gun sale that you conducted privately and innocently (perhaps to then use the money to go buy a different gun, for example) is an excruciating and painfully expensive experience fraught with peril.

And that is exactly how this President wants it. His rhetoric surrounding the release of his proposed actions makes it very clear that while he cannot *do* much, he can *threaten* much, and that he intends his bureaucracy to torment many of my fellow citizens who also happen to be gun owners.

As a lawyer who has worked on hundreds of mental commitment cases and been deeply involved in how my own community's mental healthcare system interacts with the judicial system, I would urge efforts to improve mental healthcare at the State and local level to address some of the problems of violence in this country. The Federal Government's role in such efforts should be purely supportive, as this is one of many types of challenges best addressed at the local level.

In addition to the dearth of mental healthcare available throughout most of our country, as it relates to public safety, we have a challenging balance to strike between patient privacy and liberty, public safety, and yes, liability.

It would be my hope that the Federal Government would do two things, and only two things, in the area of mental healthcare: first, provide funding to expand mental healthcare in the States by cutting lower priority programs in the Federal Government, and second, get out of the way of the States. Eliminate all of your Federal rules and requirements and trust the States to find ways to provide better and more cost-efficient care over time.

Other than providing funding for mental healthcare, the President vaguely mentioned the Department of Health and Human Services (HHS) removing barriers to States reporting information about people disqualified from purchasing guns due to mental health reasons. I would urge this committee to go much farther than that and urge HHS to cut back and simplify the Health Insurance Portability and Accountability Act (HIPAA) more generally, as the impediments to basic—though protected—information sharing cause significant problems and inefficiencies.

In the case of the Virginia Tech tragedy, the shooter's Virginia public high school had figured out how to manage the shooter's mental health issues, but they were not allowed to talk to Virginia Tech about the subject. Thus, Virginia Tech didn't even know they had a seriously mentally ill student when Cho (the shooter) arrived as a freshman. While we fixed that under Virginia law, such opportunities for improved information sharing exist throughout our legal system.

I will finish by calling your attention to very serious concerns I have about threats to due process rights referenced in the President's rhetoric. And when I say “referenced,” I mean his threats . . . not due process rights.

If the Social Security Administration is going to make conclusions resulting in the loss of Second Amendment rights by citizens, then such citizens must have notice

that their Second Amendment rights are at risk and they must have an opportunity to be heard in protection of those rights. Loose talk by this President about sweepingly denying people the right to buy a gun without any adjudicatory process is irresponsible, and actual steps in that direction would be downright tyrannical. I wish I could assume that no one on this subcommittee would ever fund or countenance such action, but how about if I just express my hope that none of you would be so unconstitutionally rash?

I am happy to answer any questions that you may have.

Senator SHELBY. Mr. Barden.

STATEMENT OF MARK BARDEN, FOUNDER AND MANAGING DIRECTOR, SANDY HOOK PROMISE

Mr. BARDEN. Thank you, Chairman Shelby. Thank you, members of the committee, for inviting me to testify.

My name is Mark Barden. A little over 3 years ago, I was a professional musician, a husband and a father enjoying a simple, happy family life. I had the opportunity to be home with my children most of the day. My wife Jackie grew up in the Bronx and put herself through school to pursue her passion, which is teaching. We now live in Newtown, Connecticut, with our three beautiful children, James, Natalie, and Daniel.

Daniel was our youngest and an absolute light of happiness and joy. Daniel's sense of awareness, empathy, and tenderness transcended his 7 years in a way that prompted many to refer to him as an "old soul." In school, Daniel earned the reputation as the sweet, little boy who would ask to sit with someone who was sitting alone or having a bad day. In fact, some of the parents of Daniel's kindergarten peers asked to have their children placed with Daniel again in first grade. At home, Daniel was a bastion of ethics and respect. For instance, at dinnertime he would scold James and Natalie if they attempted to pick at their food before my wife and I were seated at the table, and he also insisted that we offer a prayer of gratitude before we enjoyed our dinner.

I do not mean to sound like a braggy parent, but I think it is really important I think especially in this context that you take a moment to consider the humanity and the personal impact of what has been taken from us and what is at stake here.

My family and I had what we considered an idyllic existence and an ideal life.

And it all changed on the morning of December 14th, 2012 when a gunman wielding an AR-15 semi-automatic assault rifle, equipped with 30 round magazines, shot his way into Sandy Hook elementary school and shot and killed six educators and 20 first grade children. One of those children was my sweet, precious Daniel. In an instant, the little boy who danced around our house and rescued worms from the sun and held doors open for strangers was gone forever.

In the days and weeks following Daniel's murder, like all of us, James and Natalie were bewildered and heartbroken with questions that Jackie and I were ill equipped to answer, questions like "why would somebody do this, how could this happen?"

And so in an effort to try to answer those questions and through the course of research in hopes of answering those questions, we learned that over 30,000 people are killed as a result of gun-related tragedies in the U.S. every year. That is 89 people, including seven children, every single day. Gun-related fatalities are on track to ex-

ceed deaths by car accidents nationally and already do in some States. And this is unacceptable.

I have subsequently made it my life's work to try to identify realistic, sustainable solutions and ultimately save other families from having to live this never-ending pain. I am now one of three managing directors of Sandy Hook Promise, a national nonprofit organization dedicated to bringing the numbers of gun-related tragedies down through prevention programs.

The bottom line here is that we as a nation, as Americans, as individual members of our families and our communities have to do better.

Shamefully, Congress has done nothing to address this epidemic. And thankfully, President Obama and Attorney General Lynch are doing what they can within their authority as our elected leaders and President Obama as a father to take meaningful steps toward protecting our Nation's children and making our communities safer.

The package of executive actions the President is offering will help enforce laws already on the books. Adding staff and resources to the existing background check system will facilitate a faster, more efficient transaction for law-abiding citizens who wish to purchase firearms. Since many guns used in crimes have been stolen, reporting lost or stolen guns in transit will help minimize the number of firearms that end up in the hands of criminals through this pipeline. Applying better technology to firearms and making them safer will cut down on tragedies across the board from stolen guns, accidental discharge by children, and suicide.

The President has also proposed increased funding and resources be made available to bolster and improve our mental health care system. Access to quality mental health care is critical to early identification and treatment for individuals who may be on the path to hurt themselves or somebody else.

I am before you today as an informed, proud American who knows these modest proposals will go a long way toward not only saving lives but also improving quality of life. I am also before you today as a grieving father who knows firsthand the cost of inaction. So I am asking you guys to think of my sweet, little Daniel and what was lost here and the 90 American families who will lose a loved one today and the 90 American families who will lose a loved one tomorrow and so on every day until we do something.

President Obama is trying to do something. Please help him.

[The statement follows:]

PREPARED STATEMENT OF MARK BARDEN

My name is Mark Barden, a little over 3 years ago I was a professional musician, husband and father enjoying a simple, happy family life. My wife Jackie grew up in the Bronx and put herself through school to pursue her passion which is teaching. We now live in Newtown, Connecticut with our three beautiful children: James, Natalie and Daniel.

Daniel was our youngest and an absolute light of happiness and joy. Daniel's sense of awareness, empathy and tenderness transcended his 7 years in a way that prompted many to refer to him as an old soul. In school, Daniel earned the reputation as the sweet, little boy who would ask to sit with someone who was sitting alone or having a bad day. In fact, the parents of some of Daniel's kindergarten classmates requested that their children were placed with Daniel again in first grade. At home Daniel was a bastion of ethics and respect, for instance, at dinner-time he would scold James and Natalie if they tried to pick at their food before

Jackie and I were seated, and he also insisted that we offer a prayer of gratitude before we enjoyed our meal.

I apologize if I sound like a braggy parent, but I feel it is important, especially in this context, that you take a moment to consider the humanity and the personal impact of what has been taken from us and what is at stake here.

My family had what we all considered an idyllic existence and an ideal life.

And it all changed on the morning of December 14, 2012. When a gunman wielding an AR-15 semi-automatic assault rifle, equipped with 30 round magazines, shot his way into Sandy Hook Elementary school and shot and killed 6 educators and 20 first grade children. One of those children was my sweet, precious Daniel. In an instant, the little boy who danced around our house, rescued worms from the sun and held doors for strangers—was gone forever.

In the days and weeks following Daniel's murder, like all of us, James and Natalie were left bewildered and heartbroken, with questions that Jackie and I were ill equipped to answer. Questions like "Why would somebody do this" "How could this happen?"

Through the course of research in the hopes of answering these questions, we have learned that over 30,000 people are killed as a result of gun related tragedies in the U.S every year, that's 89 people, including 7 children, every single day. Gun related fatalities are on track to exceed deaths by car accidents nationally, and already do in some States. This is unacceptable.

I have subsequently made it my life's work to try to identify realistic, sustainable solutions and ultimately save other families from living this never ending pain.

I am now one of three managing directors of Sandy Hook Promise, a national non-profit organization dedicated to bringing the numbers of gun related tragedies down through prevention programs.

The bottom line here is that we as a nation, as Americans and as individual members of our families and communities—have to do better.

Shamefully, Congress has done nothing to address this epidemic. Thankfully, President Obama is doing what he can within his authority as our elected leader—and as a father, to take meaningful steps toward protecting our Nation's children and making our communities safer.

The package of Executive actions the President is offering will help enforce laws already on the books. Adding staff and resources to the existing background check system will facilitate a faster, more efficient transaction for law abiding citizens who wish to purchase firearms. Since many guns used in crimes have been stolen, reporting lost or stolen guns in transit will help minimize the number of firearms that end up in the hands of criminals through this pipeline. Applying better technology to make firearms safer will cut down gun tragedies across the board from stolen guns, accidental discharge by a child and suicide. The President has also proposed increased funding and resources be made available to bolster and improve our mental healthcare system. Access to quality mental healthcare is critical to early identification and treatment for individuals who may be on the path to hurt themselves or someone else.

I am before you today as an informed, proud American who knows these modest proposals will go a long way toward not only saving lives, but also improving quality of life. And I am before you today as a grieving father who knows firsthand the cost of inaction. I'm asking you to think of my sweet little Daniel and what was lost here . . . and the 90 American families who will lose a loved one today, and another 90 tomorrow . . . and so on every day until we do something.

President Obama is trying to do something, please help him.

Senator SHELBY. Dr. Malcolm.

STATEMENT OF DR. JOYCE LEE MALCOLM, PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Dr. MALCOLM. Thank you very much for inviting me today to discuss this important issue.

We are here today because on January 5th, President Obama announced plans to impose increased gun control measures on the country without obtaining the legislative approval of Congress.

Certainly gun safety is a central duty of government, and we are all very dismayed by the terrible incidents and mass shootings that have taken place, most recently in President's hometown of Chi-

cago, and Baltimore, and terrorist murders in San Bernardino, California.

The President has the authority and in fact the duty to see that existing laws are well enforced.

However, Members of Congress have not ignored the problem. They are sensitive to the need to balance the fundamental constitutional right of Americans to firearms for self-defense with government measures to keep persons likely to misuse weapons from obtaining them. And I must say I am happy to see the Congress and the Senate debating about helping do something about those who are mentally dangerous to themselves and others.

However, the President, thwarted in the effort to get his ideas through Congress, is acting on his own initiative to address gun violence. And there is a fundamental problem, whether his measures without congressional approval are constitutional, and I would like to address two of these proposed measures that I believe fail the test of constitutionality.

The President certainly has many opportunities through executive orders and actions to direct Federal agencies in the execution of the law. But the Constitution forbids him from changing the law. This is what he means to do with his plan to expand the definition of gun dealer. Current law requires individuals, as you have heard, who are in the business of selling guns to get a Federal license and perform background checks on buyers. Obama would now expand this to require everyone who sells even a few guns and who Federal law expressly excludes to get a Federal gun dealer license and perform background checks. And as you heard from the Attorney General, the administration really is not clear on how many gun sales would require a seller to obtain a license, the penalty of which is up to 5 years in prison and a fine of \$250,000. The ATF has explicitly warned that under the 1968 Gun Control Act when this type of licensing for kitchen table gun sales was upheld and part of the law that the courts upheld convictions for failing to have a license when as few as two firearms were sold in a year. In short, President Obama is planning to alter present law in opposition to the explicit will of Congress.

Is this permissible? In the famous case of *Youngstown Sheet & Tube*, in which President Truman was not allowed to carry out his planned seizure of steel mills, Justice Jackson explained the scope of a President's power to take unilateral action. What he did say was that—and I am quoting here—“when the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.” And he warns, “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” The President's action to alter this law unilaterally is plainly unconstitutional.

I just have another minute, but I would like to also mention the President's plan to put people who are on the No Fly List from being able to purchase a gun, and I think many of us have heard

of people like former Senator Edward Kennedy who was surprised to find his name on the No Fly List. It is compiled in secret. For the last 5 years, the American Civil Liberties Union has challenged the law's operation. It is extremely hard to get your name off the list, and there does not seem to be any due process to do so. The ACLU is representing people, including two Marine Corps veterans, one of whom is disabled, a U.S. Army veteran, and a U.S. Air Force veteran. And in an article that their project manager for the National Security Project wrote, she claims, "Until the No Fly List is fixed, it shouldn't be used to restrict people's freedoms." That holds true for their freedom to travel. Certainly also they should not have their Second Amendment right for self-defense impugned as well.

Thank you.

[The statement follows:]

PREPARED STATEMENT OF DR. JOYCE LEE MALCOLM

We are here today because on January 5 President Obama announced plans to impose increased gun control measures on the country without obtaining the legislative approval of Congress. Certainly public safety is a central duty of government and a concern of us all. We are rightly dismayed by the rash of shootings, most notably in the President's hometown of Chicago, and recent terrorist murders in San Bernardino, California. And the President has the authority, indeed the duty, to see that existing laws are well enforced. However, Members of Congress have not ignored the problem. They are sensitive to the need to balance the fundamental constitutional right of Americans to firearms for self-defence with government measures to keep persons likely to misuse weapons from obtaining them. With the exception of bills now under discussion in Congress proposing more facilities for the dangerous mentally ill, the majority of members have concluded that there is sufficient gun legislation in place, it simply needs better enforcement.¹ Thwarted in his effort to get his preferred ideas through Congress, President Obama is acting on his own initiative to address gun violence.² Beyond the efficacy of his proposed measures—and there is good reason to doubt that they would prevent gun crime—is the fundamental question whether Obama's plan to impose these measures without congressional approval is constitutional. I would like to address two of his proposed measures that fail the test of constitutionality.

The President has many opportunities through Executive orders and actions to direct Federal agencies in the execution of the law. But what the Constitution clearly forbids him from doing is changing the law. That is what he means to do in his plan to expand the definition of "firearms dealer." Current law requires individuals who are in the business of selling guns to get a Federal license and perform background checks on buyers.³ Obama would now expand this to require everyone who sells even a few guns and who Federal law expressly excludes, to get a Federal gun dealer license and perform background checks on buyers. The administration was unclear how many gun sales would require the seller to obtain a license but the penalty for failure to do so would be up to 5 years in prison and a fine of up to \$250,000 in addition to further penalties for the failure to carry out a required background check. The ATF has warned that under the 1968 Gun Control Act, a law that required licensing for so-called "kitchen table" gun sales, courts upheld convictions for failing to have a license when as few as two firearms were sold in a year. In short Obama is planning to alter the present law in opposition to the explicit will of Congress.

¹ Representative Tim Murphy, Helping Families in Mental Health Crisis Act (H.R. 2646) has bipartisan support with 178 cosponsors.

² Although the President refers to "the epidemic of gun crime," in fact gun crime and gun murders have been declining for more than 20 years. See for example Robert Farley, "Gun Rhetoric vs. Gun Facts," December 21, 2012, <http://www.factcheck.org>; "Firearms and Crime Statistics," Bureau of Justice Statistics, Jan. 22, 2015.

³ [A] person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms. 18 U.S.C. § 921(a)(21)(c).

Is this permissible? In the famous case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), where the Supreme Court found President Truman's seizure of steel mills unconstitutional, Justice Jackson carefully explained the scope of a president's powers to take unilateral action, setting out three scenarios to guide us.⁴ First, he points out, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate in these circumstances."⁵ The second type of action Jackson describes occurs "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."⁶ But Justice Jackson insists, "when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress, over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."⁷ The justice warns, "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." The present instance is in this category. Congress has expressly exempted individuals who only occasionally sell a gun from the requirement to be licensed. Only Congress can change that requirement. The President's action to alter the law unilaterally is plainly unconstitutional.

Another of Obama's proposals would prohibit anyone whose name appears on the Government No Fly List from being able to purchase a gun. While this sounds like a sensible idea since the No Fly List is meant to target potential terrorists, it is compiled in secret and includes people who have no specific evidence against them and whose names are on the list merely because they sound like or are spelled like someone else's. The late Senator Edward Kennedy was surprised to find his name on the No Fly List. By 2014 the Obama administration had greatly increased the number of people on the No Fly List although since the list is classified it is uncertain how many names are on it. Estimates vary from 21,000 to 47,000.⁸ For the past 5 years the American Civil Liberties Union has challenged the law's operation. Last year the organization complained that in 12 months the Government's secret list of suspected terrorists banned from flying to or within the United States had more than doubled. They estimated that 35 percent of the nominations to the terrorist watch lists were outdated, while the Government watch list network included tens of thousands of names placed on the lists without adequate factual basis. Worse, the Government had no meaningful way to correct the errors and permit people to clear their names. In fact the ACLU has been suing to change the list's redress process.⁹ Their challenge is on behalf of 15 American citizens and lawful residents who found themselves on the list and unable to fly. These include two Marine Corps veterans, one of whom is disabled, a U.S. Army veteran, and a U.S. Air Force veteran. None were told why they were on the list or given a chance to clear their names. These people were stripped of their right to travel without proper due process. Now President Obama wants to add the names of all those on the No Fly List to the National Instant Criminal Background Check System (NICS) also depriving them of their fundamental right to be armed. The title of an article written by the ACLU director of its National Security Project protests, "Until the No Fly List Is Fixed, It Shouldn't Be Used to Restrict People's Freedoms." That certainly holds true for their freedom to exercise their Second Amendment right to be armed for self-defence and other lawful purposes.

There is much the President can do to enforce those laws already on the books to defend citizens against gun violence. The NICS depends on States reporting the names of felons and individuals whose mental illness has made them dangerous to themselves and others from buying guns. These records are woefully incomplete. Despite Congress passing the NICS Improvement Amendments Act in 2007 the NICS

⁴ Justice Jackson, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), p. 343 p. 343 U.S. 635.

⁵ *Ibid.*, p. 343 U.S. 636.

⁶ *Ibid.*, footnote 4/3.

⁷ *Ibid.*, p. 343 U.S. 638. Footnote 4/4.

⁸ Jeremy Scahill, Ryan Devereaux, "Barak Obama's Secret Terrorist-Tracking System, by the Numbers," *The Intercept*, August 5, 2014, <https://theintercept.com>. The ACLU reported that only 21,000 people were on the No Fly List including some 500 Americans. "No Fly List Grows, Along with Injustice for Those Wrongly Stuck on It," American Civil Liberties Union, <https://www.aclu.org>.

⁹ Hina Shamsi, "Until the No Fly List Is Fixed, It Shouldn't Be Used to Restrict People's Freedoms," December 7, 2015, <https://www.aclu.org>.

lacks up-to-date and accurate reports from many States. Without timely reporting the background checks cannot be effective.

If the President has a case to make for his ideas on preventing gun violence he needs to work with the Congress to pass the necessary legislation. Taking unilateral action that is patently unconstitutional is, in the long run, just as dangerous to the welfare of Americans as gun violence itself.

Senator SHELBY. I thank all of you.

I will start with you, Attorney General Strange. According to the President's executive actions, the U.S. Attorney General will begin a new dialogue with States to ensure the robust provision of data into the National Instant Criminal Background System.

Yet, in recent years, as we have noted, his budget has proposed to cut the funding for the NICS program. That is grants to States and local law enforcement agencies that help to make technology upgrades that enable better criminal data sharing, as has been pointed out here.

Congress has balked at the President's proposal. This committee has balked at it and instead restored funding levels for these important grants.

Attorney General Strange, how have the President's disjointed funding priorities for Justice Department grants and other State-related support programs impacted communities in our State of Alabama and elsewhere?

Mr. STRANGE. Senator, they have not been helpful. And I want to commend the leadership here in this committee for its support of local law enforcement because I think, as has been made abundantly clear, without the resources, the States cannot adequately get the information to the instant check system. Without doing that, we have a system that is functionally broken, and that is a very detrimental thing for law enforcement in our States. And I do not think I am speaking just for Alabama here. I think as a chief law enforcement official, every law enforcement official at the State level would say that.

And I did some checking. Even though we have had a requirement to provide this information for some time, it is only recently within the last year that we have received any money at the State level to develop the technology and all the information that is needed to put that information into the Federal database.

Senator SHELBY. Well, should this not be a high priority for the President, as well as this committee?

Mr. STRANGE. I think the best thing this committee could do would be to make that the highest priority and allow the States to fund that information, put it into the system so that we can identify gang members and others who attempt to violate the law.

Senator SHELBY. What Senator Lankford pointed out earlier in the committee—and I think you were here—I thought that was spot-on.

Mr. Cuccinelli, in our public service as the Attorney General of Virginia and in your position as State Senator at one time, you have been a strong supporter of the Second Amendment rights. Now, as a founding partner in the United Self Defense Law Firm, which focuses on providing counsel in the area of self-defense rights, you are continuing to focus your career on the protection of the Second Amendment rights.

My first question: Do you believe that the President's executive actions to implement new gun control measures will have a deterrent effect on violent gun crimes in our country?

Mr. CUCCINELLI. The answer to that is a simple no. What he has done in the area of guns is so thoroughly indirect as it relates to actual crime occurring either on the street or when you have tragic mass shootings and mental health-related incidents. There cannot be a connection. Anyone contemplating crime—when you think of deterrence, you think of them contemplating the consequences. This will have nothing to do with that.

Senator SHELBY. You have spent a lot of time in your background dealing with the mental health issues that face all of us in this country. How can we do more there, and what would you recommend?

Mr. CUCCINELLI. In your exchange with Attorney General Strange, you noted States reporting information, and one of the lessons learned out of Virginia Tech for us was, in the case of Cho, he had encountered our mental health system, but he had not been formally adjudicated without his objection for mental health incapacity. However, he had submitted within our court system to mental health treatment, and because he went that route rather than resisting the adjudication, he was not reported to the NICS system.

We have fixed that in Virginia, and I believe a lot of other States learned some of our informational lessons, if you will. If you look about a year to 2 years after Virginia Tech, you start to see in the data a much higher rate of reporting of these sorts of people to the NICS system because we do not want them to be able to purchase firearms. And that as a failure of a system that we thought would cover this area in Virginia, and I think a lot of other States are learning from that mistake and fixing it.

Senator SHELBY. You are not saying you solved the problem, but we have taken some steps in the right direction.

Mr. CUCCINELLI. We have taken some steps in the right direction. You heard statistics earlier today about the number of gun checks, 23 million or so, and in Virginia—and I am sure it is true in Alabama as well—we stop hundreds if not thousands of gun sales already, many of them being caught up in the system because of the information provided this way. And those information blocks are substantial. That is the one way that we might have changed the outcome at Virginia Tech. In a lot of these incidents, it is hard to find any way to have changed the outcome based on the kinds of regulatory impositions the President is talking about here.

Senator SHELBY. Sir, the executive actions, which we have been talking about—and I call it chipping away at the Second Amendment rights here. How would the President's proposal infringe on the Second Amendment rights of law-abiding citizens?

Mr. CUCCINELLI. Well, to take the word you used earlier, the "deterrent," the impression given to those operating as individuals, though not in their mind conducting the business of gun sales, is that they are being intimidated here. They are being harassed. You know, the Attorney General kept saying that they were clarifying. I have to say I was sitting back there thinking she knows what this word means, and that is not what they are talking about. They are holding a 5-year prison sentence out over the heads of anyone who

is not a gun dealer and who by any objective standard ought not be considered one but who does sell a gun—and the Attorney General has said one is enough—to fall under their umbrella. And with penalties like that, the obvious intent is to deter people from even considering making those otherwise and objectively entirely legal sales.

Senator SHELBY. But millions of Americans—millions—own guns. I, for one, have sold a gun and taken money to buy another gun, but I am not a gun dealer and so forth.

Mr. CUCCINELLI. Yes.

Senator SHELBY. But under the Attorney General's recommendation or the President's recommendation, that could curtail my rights to do that. Could it not?

Mr. CUCCINELLI. And that is how it affects your actual exercise of the Second Amendment. If you are a law-abiding citizen—and I am a gun owner. I have done exactly what you just described, Senator. I have sold one gun and bought another one to kind of upgrade the kind of gun I own. And the idea here—my impression from the President, the Attorney General on down—is that they want folks in that situation to think twice, to maybe not be comfortable selling that gun except directly to and from a firearms dealer where there are background checks going both ways. And so the ultimate effect is to slow down the opportunity to legally purchase by law-abiding citizens firearms. That is where the imposition on the Second Amendment—

Senator SHELBY. Chipping away at our constitutional right.

Mr. CUCCINELLI. Yes, sir.

Senator SHELBY. Do you believe that rather than saving lives, the President's executive actions could result in more lives lost through the violation of a constitutionally guaranteed right to self-defense?

Mr. CUCCINELLI. Well, certainly one of the things that is little discussed in situations like this is the defensive use of guns, is the actual use of guns for protection. If you go 5 years before Virginia Tech, we had another school shooting down in southwest Virginia at Appalachian Law School where a student came onto the campus, shot and killed three, and was stopped by two students who ran to their cars and got their guns. And that person, unusually enough, simply surrendered. Normally when confronted, someone with mental health issues—they actually take their own lives most of the time, statistically speaking. But there it was used 5 years before Virginia Tech as a protective measure.

And there is no compilation of those occurrences anywhere that I know of, and yet we see them all the time. In my law firm, those are the kinds of people we are defending. We have hundreds of clients. We have never had a client inappropriately use a gun. We have defended clients who have drawn their guns in defense and had to then protect themselves from prosecution, for instance, and all of those have been resolved favorably. But that is understated here.

There is no questioning the tragic outcomes that happened time and time again in this country, but it is also the case that Second Amendment rights are exercised and guns drawn to protect people, to defend families, to stop crimes that are in process.

Senator SHELBY. Just share with us for a minute something we all believe in and we were taught and practice. We have a right to defend ourselves. Do we not?

Mr. CUCCINELLI. Absolutely. It is a natural right. And we are a natural law country, and the Second Amendment, as one of the Justices—I believe it was Scalia—said, did not give us this right. It preserved the right that we already had as a matter of natural law.

Senator SHELBY. Thank you.

Professor Malcolm, the President has announced that stricter standards, not past or vetted or evaluated with Congress, will be applied by the ATF to determine if the seller of a gun “is engaged in the business of selling firearms,” and required to perform background checks.

My question. Do you believe that the President’s announcement of an undefined measurement—undefined measurement—for determining when a gun seller is “engaged in the business of selling firearms” and thus required to perform background checks will result in harassment and legal consequences for law-abiding citizens who are simply engaged in constitutionally protected firearms transactions, as Mr. Cuccinelli and I discussed?

Dr. MALCOLM. Yes, I do.

Senator SHELBY. And why? Explain why.

Dr. MALCOLM. Well, because as the Attorney General said, we keep explaining and getting all these calls. She would not say how many guns were required to put someone in the category of being a gun dealer. Right now, the law is quite explicit that it has to be someone whose main business is selling guns. And the law explicitly exempts and kind of explicitly exempts the casual gun seller from that. And they seem to be blurring that definition and really thwarting the will of Congress because I think Congress took pains to make sure that it would not include people who were just occasional gun sellers.

Senator SHELBY. Do you think that this announcement by the President will have a chilling effect on citizens who merely want to exercise their constitutional rights? I use myself as an example. I have guns, and I have bought guns and I have sold guns and upgraded. And I believe I have that right to do it. I am not a gun dealer.

Dr. MALCOLM. You are not a gun dealer, no.

Senator SHELBY. I am not a gun dealer.

If this went into effect, I might say, well, gosh, somebody might come after me for doing that. Yet, I might sell the gun to a judge or somebody, you know, a good citizen, or a prosecutor or lawyer or something like that.

Dr. MALCOLM. Well, it is bound to have a chilling effect, especially when they have announced that the punishment for not having that license as a gun dealer is up to 5 years in jail and a fine of \$250,000, not counting additional punishment for not doing a background check. So with that kind of draconian punishment, a threat and no explicit explanation of how many guns would require you to be listed and get a license.

Senator SHELBY. In a way, it would be an intimidation syndrome—would it not—

Dr. MALCOLM. Oh, yes.

Senator SHELBY [continuing]. Out there saying you better be careful. In other words, I have these rights but I better be careful to exercise them. I better do this because of somebody signing an executive order infringing on my constitutional rights. Is that fair?

Mr. CUCCINELLI. Yes.

Senator SHELBY. Thank you.

Dr. MALCOLM. And when the ATF has made a point of saying that in the past they have prosecuted someone for selling as little as two guns in a year, I mean that is sort of indication of what their intentions are.

Senator SHELBY. Dr. Malcolm, you spent a great deal of your professional life studying constitutional rights, the Second Amendment, and so forth. Is the Second Amendment just as important to the wellbeing of this country as the First Amendment, Third Amendment, Fourth Amendment, and so forth?

Dr. MALCOLM. It certainly is because it embodies your right to self-defense, which has been mentioned. And no right is more important than your right to defend yourself and your family. And so it absolutely is extremely essential. And there are countries where people do not have the right to self-defense, and they are supposed to depend on the government. And no government can protect everyone all the time. So it tends to be ignored. As Mr. Cuccinelli said, these self-defense uses of guns—and while the FBI does not record self-defense uses of guns, it has been estimated from studies that there is something like a million and a half of these a year where law-abiding citizens protect themselves and their families, for the most part, just having to show a gun to stop a crime from taking place.

Senator SHELBY. Have you seen any administration in recent years or even in past years in the presidency that would look at part of our constitutional makeup and attack this amendment, the Bill of Rights, or attack this part of the Constitution like this administration?

Dr. MALCOLM. I think they have been rather clear that if they had just desserts, as it were, their preference, that they would ban guns. I mean, the President spoke glowingly of Australia's buyback and banning of guns for its people. I think that if they could, they would.

I always find it interesting that when they talk about the Second Amendment, they like to refer to hunting. You know, it is fine to have a gun for hunting. Hunting does not rise to the level of constitutional right. It is self-defense that does.

Senator SHELBY. Self-defense is self-preservation. Is it not?

Dr. MALCOLM. Yes.

Senator SHELBY. Mr. Attorney General?

Mr. STRANGE. Absolutely.

Senator SHELBY. Senator Murphy.

Senator MURPHY. Thank you very much, Mr. Chairman. Thank you all for your very candid testimony.

I sort of feel as if this is a hearing on a document that I have not seen, and so I want to explore some of the inconsistencies between the interpretation of three of our witnesses and the words on the page.

But first I want to just start with you, Mr. Barden. I want to thank you for your advocacy in the face of unimaginable grief. And I want to specifically thank you for holistic way in which Sandy Hook Promise has attacked this problem. We are sitting here talking about the ways in which we can change the enforcement of gun laws in order to prevent homicides. But your organization recognizes that the way in which we attack the issue of gun violence is not simply through changing gun laws or better enforcement of gun laws, but also through increased efforts to buttress mental health resources or to increase gun safety or to prevent violence in the first place. So you have a much broader agenda. Do you not?

Mr. BARDEN. Absolutely. And I think I hear words like “attack” and this adversarial approach, and I think we should all be on the same page here. I think really we should be looking for solutions where we can agree that we need to move forward. Something has to be done. And the problem of gun-related tragedies is huge and broad and complex, and no one law will fix it all, no number of laws will fix it all, nothing will fix it all. But we have to approach it in a more, as you said, holistic way, Senator.

Senator MURPHY. One of the reasons that you do focus on the issue of gun laws is because the research that you have looked at makes it pretty clear that States that make it harder for criminals to access guns have lower rates of gun homicide. And in fact, a very recent report from Johns Hopkins, comparing Connecticut’s law against Missouri’s law and the effect of gun violence rates and gun homicide rates in those two States, suggests there is a real connection between the laws on the books with respect to the easy access of guns to criminals and rates of gun homicide.

Mr. BARDEN. Yes, that is correct, Senator. There is clear evidence-based research conducted by Johns Hopkins that clearly indicates that the permit to purchase regulation actually has reduced homicides by 40 percent. It has reduced suicides by over 15 percent. And those numbers are reflected in the inversion in States like Missouri that do not have this law where homicides have risen by 40 percent in the same time period. Suicides have gone up 15 percent. And it comes down to access.

And what we are talking about here is the whole fabric of this with regard to access, with regard to prevention. As you mentioned, my organization, Sandy Hook Promise, is looking—we do a lot of work in the space of prevention and finding those individuals who are on the path to violent behavior and getting them to the help that they need. And so we should be bolstering our mental health system. We should have better legislation and mental health reform in place—for a place to get these people to the help that they need.

Senator MURPHY. Let me get at this inconsistent reading of the words of the guidance here. So let me start with you, Dr. Malcolm. I just want to make this clear for the record. You spent a decent amount of your written testimony in the last portion of your verbal testimony talking about a conversation about including individuals on the No Fly List on the list of those that would be prohibited to purchase guns. Let us just make it clear for the record that is not in the President’s executive order that is the subject of this hearing. Is that not correct?

Dr. MALCOLM. The President said that he wanted to include people on the No Fly List in the background checks so they would not be able to buy guns.

Senator MURPHY. But he has asked that Congress to make that change. He has not included that in—let us just make it clear.

Dr. MALCOLM. It was one of his proposals.

Senator MURPHY. That is not in the executive actions announced.

Dr. MALCOLM. It was one of those he announced. That is how I know about it.

Senator MURPHY. For the record, it was not in the set of executive—

Dr. MALCOLM. Then where did it come from?

Senator MURPHY [continuing]. Actions that he announced. He has requested that Congress make that change, and the President has acknowledged that that is a subject that is within the jurisdiction of Congress, not within the jurisdiction of enforcement of existing law. So I think it is important to point out for the record that that is not part of the underlying executive actions.

Second, I just want to make clear. You said in your testimony or maybe in answer to a question from Senator Shelby that he announced that the penalty for violating the existing law with respect to who needs to be licensed is a certain period of time in jail.

Dr. MALCOLM. I said announced and I misspoke. The penalty is listed as on the record, the part of which you read.

Senator MURPHY. That is existing law. Correct?

Dr. MALCOLM. That is existing law.

Senator MURPHY. That is existing law.

And I think this speaks to part of our disagreement. If the very notion of expressing what the penalty is for violating the law equals intimidation, then that is a very different reading of our set of criminal statutes that many of us have come to understand. That is a simple recitation of the existing penalty.

Dr. MALCOLM. But when you imply that a whole lot of people who are not at the moment under the law are going to be and will face that penalty, then I think that it is important.

Senator MURPHY. So then let us get to that implication.

Thank you very much, Attorney General Strange, for being here today.

You used strong words in referring to the President's executive order. I think you talked about this being an unwarranted assault on the Second Amendment. And I think this is where we get down to a question of the words on the page versus your perceived intention. And maybe we can all concede that it is a little difficult for us to understand what sits in the thoughts and minds of the individuals who write laws and write guidance. And so we are left, first, with the words on the page.

So maybe just share with me which of these sort of five key points that are in this guidance do you perceive to be the unwarranted assault on the Second Amendment. Or is that interpretation dependent on an interpretation of intentions that you have derived independent of what the Attorney General has testified to today?

Mr. STRANGE. Well, I think I would adopt the comments of my colleague, Senator Cuccinelli, and I think Senator Shelby has al-

ready sort of gone into that detail. And I am happy to answer that question.

But I really jumped at the opportunity to come at the Senator's invitation because I wanted to deliver the message from the men and women on the street, the people who are actually going into the catastrophic active shooter situations and get their opinion and bring that here not only to criticize the President's proposal, because I do not think it is the right way to go about addressing these issues we all care about, but to point out that the areas that do make a difference and where the Senate committee here can make a difference have been neglected. And one example is the—

Senator MURPHY. But I guess my question is—I am going to run out of time. I know I am already over. But what specifically, what is the section here that you perceive to be intimidating? What is the language here that is the assault on the Second Amendment, to the extent that you can point me to the provision that you are referring to?

Mr. STRANGE. If I could follow up with that, I will be happy to, Senator. I do not have it in front of me. But I can tell you that the sentiment of the men and women in law enforcement, the people that I work with every day who are devoted to solving the problems that we all care about—

Senator MURPHY. I appreciate that. I think you have an obligation to point to the specific provisions given that we are talking about it.

I think, Mr. Cuccinelli, you might be jumping at that opportunity. So let me just turn it over to you.

I get the sense that you probably have the most problem with the recitation of the existing court cases that are currently the way in which you would interpret whether you are subject to the requirement or not. And so you repeatedly referred to the suggestion that if you sell only one firearm, that you may be required to obtain a license. That is included in a section which simply recites existing court cases.

So let me just ask you a simple question. Do you dispute any of the information that is listed in this section relative to the description of existing court cases on this question of who has to get a license?

Mr. CUCCINELLI. My concern partly arises from experience. I mean, in my 4 years as Attorney General of Virginia, I dealt with the business end of the spear of the Federal Government as they over-read, if you will, over-interpreted and thereby used very aggressively authority they did not have. And we beat them back occasionally, but we had to do it. And they are counting on the fact that corporations and individuals do not want to fight with the Federal Government.

And the intimidation you were asking the professor about, it is rather vaguely worded despite the Attorney General's continual use of the word "clarify." It is exactly the opposite of what they are doing. They are opening the door to the application of 5-year jail penalties to a bunch of people who right now under the existing law believe they understand that they do not fall under that—

Senator MURPHY. What is vague here? Point me to the—what I see is a recitation of the existing law and then a recitation of exist-

ing court cases that are public records. So what of that is intentionally vague such as to be intimidating?

Mr. CUCCINELLI. Senator, if all they wanted to do is actually apply the laws that exist today, they would not have to say anything. They can just keep pressing ahead and make greater efforts, hopefully, to apply the existing laws.

Senator MURPHY. What is vague here?

Mr. CUCCINELLI. When you bring all of it together—and you all or the Attorney General with one of you on the panel was discussing circuit-to-circuit differences, for instance. The Fourth Circuit, which I am in—we have some unique case law, but the people who live in the Fourth Circuit who do think of themselves as dealers and who do make a business of selling recognize what that law is. They have come to understand it. And so now you are introducing at the national level a new threat of enforcement that there would not be any need for if the law was not going to change. So what are they to think? They are to think that something has now changed and the 5-year penalty is being held out over their heads in a way that they now have to be concerned about. That intimidation has been used in all sorts of regulatory arenas by this administration for 7 years.

Senator SHELBY. I just want to go back to the law. This is the U.S. Code and I am going to quote from it that you all are familiar with for the record.

As applied to a dealer in firearms, as defined in section 921 and so forth, a person who devotes time, attention, and labor to dealing in firearms as a regular course of a trade or business with the principal objective of livelihood and profit through the repeated purchase and resale of firearms, but such term shall not include a person—this is very important—who makes occasional sales, exchanges or purchases of firearms for the enhancement of a personal collection or for a hobby or who sells all or part of his personal collection of firearms.

So the President, I believe, is trying to assault the constitutional rights, and also he is trying to get around the law. The law is clear here. Is it not? Am I wrong?

Mr. CUCCINELLI. I think he is trying to eliminate the last clause of that section.

Senator SHELBY. That is right, by executive order not through Congress and a debate. Is that correct, sir? You all agree with that. You agree with that, Doctor?

Mr. BARDEN. May I make a comment on that? I think there is a part of that that everyone seems to be missing in that there are other factors that have to be included. It is not just that you are one person that you are saying is selling one gun. And that is why they do not have a number because the widow whose husband dies and she is trying to sell off his collection would not be subject to this.

Senator SHELBY. Dr. Malcolm, go ahead.

Dr. MALCOLM. Because you had asked me.

Mr. BARDEN. I am sorry. Can I finish?

Senator SHELBY. Let her answer. Go ahead.

Dr. MALCOLM. Yes. I think that the Congress has been very explicit that it wanted to prohibit the inclusion of the occasional gun

seller from having to be listed as—get a firearms license as a gun dealer. And you have read us the existing law. But the President has announced that he wants to change the existing law.

Senator MURPHY. I did not read you the existing law. I read you the actual executive action that we are debating today.

Dr. MALCOLM. Okay. But the President announced that he wanted to include the so-called gun show loophole, the people who sell here or there, the occasional—

Senator SHELBY. He wants to include rights that are protected in the law.

Dr. MALCOLM. Yes.

Senator SHELBY. He wants to do it by executive order. Is that correct?

Dr. MALCOLM. That is as I—

Mr. BARDEN. May I finish?

Senator SHELBY. Yes, sir. Go ahead, Mr. Barden.

Mr. BARDEN. Let us look at what this is actually aimed at. It is aimed at these people who have emerged especially with the Internet to sell thousands of firearms while they have another—maybe they are a used car salesman. That is their job. But in the meantime, they may not have a store, but they have business cards. They may be selling firearms in their existing packaging. They are clearly in the business. And that is why they have not defined a certain number to delineate who is in the business and who is not so that people who should not be captured are not captured like the widow who is trying to sell her husband's arms to Cuccinelli who wants to operate will not be captured in this.

Senator SHELBY. Well, I think a lot of us would agree that we want to keep guns away from people with mental health problems, criminals, terrorists, and everything else. But we want to, I hope, always protect the right of gun owners and people who own guns, have guns, sell guns under the Second Amendment.

Mr. BARDEN. I do not see any infringement on that in any of this language.

Senator SHELBY. Do you agree with that?

Mr. CUCCINELLI. I do, but I think Mr. Barden raises a legitimate issue about the change in the nature of sales with the growth of the Internet. I mean, I will just name Craigslist, for instance. And there is nothing wrong—I do not think anybody would object to making sure that folks using those avenues are properly following—either licensed, if they should be—

Senator SHELBY. Follow the law.

Mr. CUCCINELLI [continuing]. As it exists now. But new law was not needed for that.

However, the requests for additional enforcement tools perhaps would get to exactly those kinds of folks.

I would note for you what is called the gun show loophole is not a new debate. 40 miles west of here we have the largest gun show on the East Coast. We have it because of legislation I got in the State Senate that Mark Warner, one of your colleagues, signed as governor at that time. And we went through that gun show, over a thousand tables, over 400 of them with gun sales going on—400 tables—with the proprietor filming it and went to every single seller of guns and asked every single one if they were a licensed deal-

er. Every single one of them was except six. Of the six, we asked three of them, well, what are you doing? Why are you here selling these guns? And all three of them had the same answer, that they were all private collectors liquidating part of their collection. All three of them.

Senator SHELBY. Which is covered here in the law.

Mr. CUCCINELLI. It is covered in the law.

And the debate, just in Virginia—it happened every year. There is never a year off from this debate. There was never identified in Virginia a purchase, referring to the statistics that Attorney General Strange mentioned—that came from the Clinton administration, by the way—where we found criminally used guns being bought and sold at gun shows. It has never happened in Virginia.

Senator SHELBY. Yes, Senator.

Senator MURPHY. Mr. Chairman, just kind of wrapping up, kind of a concluding thought.

I think at the heart of this issue is simply a disagreement about what the words on this page say. And I think it is important that when pressed, none of our witnesses could actually recite any actual verbiage in the order which speaks to this claim of intimidation.

And I think the exception that you talked about, Mr. Chairman, for those that are just engaging in personal sales from their collection is important, but that is in the guidance. The guidance says very specifically if you only make occasional sales of firearms from your personal collection, you do not need to be licensed. You need to be licensed if you repetitively buy and sell firearms with the principal motive of making a profit.

I think there is just a fundamental disagreement about what is actually on the page here, and I hope that as we have this debate, it is not anchored in perceived intentions of what the administration is quietly, secretly planning to do, but that the objections are based in the actual text of the executive order. And I think that has really been missing in this hearing so far. We have been missing disputes and objections that are anchored in the actual text. If you come back to the text, it says exactly what we all agree on, which is that we should enforce the existing law, we should require people engaged in the business of selling firearms to get licensed wherever they do so, and that we should let out from under that rubric of regulation those that are just selling firearms occasionally from their personal collection.

Senator SHELBY. Well, thank you, Senator. I believe the end game should be that we all uphold the Constitution, all amendments, including the Second Amendment.

I want to thank the witnesses for coming here today. We have had an interesting debate, and I think the timeliness is good.

Any questions that would be submitted to you, we would hope you would answer within 30 days for the record.

ADDITIONAL COMMITTEE QUESTIONS

[The following questions were not asked at the hearing, but were submitted to the Department for response subsequent to the hearing:]

QUESTIONS SUBMITTED TO HON. LORETTA E. LYNCH

QUESTIONS SUBMITTED BY SENATOR LISA MURKOWSKI

Question. A premise of the enforcement guidance is that there is some substantial number of people conducting business at gun shows who are not licensed dealers but should be. I have heard from constituents who frequent gun shows telling me that this is not the case. In fact, they think that the administration is simply hostile to private seller transactions at gun shows and wants to chill lawful sales by non-dealers because it cannot win political support for the universal background check.

Is there any empirical data to suggest the extent of the problem the administration seeks to address and consistent with its “Smart on Crime” initiative does your department intend to approach enforcement in a targeted way?

Answer. The guidance does not change the law. Drawing on court decisions and the statute itself, the guidance explains to the public when a Federal firearms license is required under Federal law. Importantly, the guidance makes clear that it does not matter where you conduct your business, from a store, at gun shows, or over the Internet: If you are engaged in the business of selling firearms, you need to get a license and conduct background checks. This guidance gathers existing case law in one place and discusses common scenarios so that there are clear, definitive standards set forth for anyone who seeks to sell a firearm, and individuals can know if they are required to register or not.

I am confident that the actions announced earlier this year will help to make our communities safer, and our law enforcement more effective. I also have no illusions that these measures by themselves will end gun violence in America. At a time when there is so much work to be done and so much capacity for progress, there are many areas where only Congress can act. We would welcome the opportunity to work with you to further these goals.

Consistent with our Smart on Crime policy, I have directed ATF to continue to focus its resources on illegal firearms traffickers who supply firearms to criminals and other persons prohibited from having them—whether those traffickers are unlawfully engaging in the business of dealing in firearms without a license, or are one of the small number of licensed entities who willfully violate the law to arm dangerous persons.

Question. Another criticism that I have been hearing from my constituents is that your department will deploy the hundreds of new ATF agents the administration proposes to hire to walk up and down the aisles at gun shows, demanding that those who are not FFLs to prove that they are not violating the law, distracting the exhibitors from paying attention to their customers and driving traffic away from their booths.

What is your reaction?

Answer. This concern is unfounded. Consistent with our Smart on Crime policy, I have directed ATF to continue to focus its resources on illegal firearms traffickers who supply firearms to criminals and other persons prohibited from having them—whether those traffickers are unlawfully engaging in the business of dealing in firearms without a license, or are one of the small number of licensed entities who willfully violate the law to arm dangerous persons. Our efforts are focused not on law-abiding gun owners, but on violent offenders and the illegal firearms traffickers who supply their guns. We will continue that targeted approach going forward with our existing resources, as well as any additional resources we may receive to help reduce violent crime.

Question. Does the department intend to issue written guidance to ATF agents on how they are to enforce the new guidance if so will that guidance be available to Congress and the public so we can ensure that it discourages harassment of those who are within the law?

Answer. The Department’s enforcement priorities have not changed as a result of the guidance. Consistent with our Smart on Crime policy, I have directed ATF to continue to focus its resources on illegal firearms traffickers who supply firearms to criminals and other persons prohibited from having them—whether those traffickers are unlawfully engaging in the business of dealing in firearms without a li-

cense, or are one of the small number of licensed entities who willfully violate the law to arm dangerous persons.

Question. The President contends that the enforcement guidance doesn't make any new law but simply cobbles together elements of "engaging in the business" which have been upheld by the courts. When my staff read the guidance they were expecting to see footnotes explaining which cases support which propositions—there were none there. This leads to suspicion that the Justice Department cherry-picked the lower court case law which supported the policies it wanted to advance in the guidance and turned that case law into national precedent.

How would you respond to this criticism regardless of the precedents do you really think that selling one gun makes one a gun dealer?

Answer. The guidance ATF issued regarding when a person is "engaged in the business" of dealing in firearms, and therefore must obtain a Federal license, did not in any way alter existing law. The purpose of the guidance is to help the public understand when a Federal firearms license is required. The guidance is intended to explain in plain language the statutory licensing framework and the factors that courts have used to determine whether a person's activities require a license under Federal law. As such, the guidance did not include citations to specific cases; it does, however, fully and fairly summarize how the courts have applied the law.

The statutory definition of "engaged in the business," 18 U.S.C. §921(a)(21)(C), does not require any minimum number of sales for a person to be engaged in a firearms business requiring licensure. Rather, under the statute, the person must devote time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit, and it excludes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection.

Courts interpreting this provision have identified factors that demonstrate when a person meets this statutory definition. As the guidance explains, these include: whether the person represents him/herself as a dealer in firearms; whether the person is repetitively buying and selling firearms; the circumstances under which the person is selling firearms; and whether the person is looking to make a profit. No single factor is determinative, and the relative importance of any of the factors will vary depending on the facts and circumstances applicable to the individual seller.

Question. In 1979, the Carter administration issued an Advance Notice of Proposed Rulemaking which suggested that the ATF "engaging in the business regulation" was vague and asking the public whether it should go through a notice and comment rulemaking to make it better understandable. That effort fell by the wayside but the regulation in question is just as vague today as it was in 1979.

Why did the administration opt for writing guidance on "engaging in the business" behind closed doors rather than pick up on the notice and comment process that the Carter administration started and act more transparently?

Answer. When ATF issued the Advance Notice of Proposed Rulemaking in 1979, there was no statutory definition of "engaged in the business" of dealing in firearms. That changed in 1986 with the passage of the Firearms Owners' Protection Act, which provided statutory definitions for the relevant terms. The guidance issued by ATF in January 2016 restates those statutory definitions as enacted by Congress, and explains how Federal courts have interpreted them. To the extent that there is any confusion about when a license is required under Federal law, we believe clearly communicating the scope of the statute, as interpreted by Federal courts, helps clarify those requirements and enhances compliance with the law.

QUESTIONS SUBMITTED BY SENATOR MARK KIRK

Question. As part of the President's Executive actions on firearms, the Bureau of Alcohol, Tobacco, Firearms and Explosives is directed to enhance the National Integrated Ballistics Information Network (NIBIN). NIBIN is a critical tool for uncovering investigative leads in gun crimes around the country.

The Department of Justice (DOJ) recovers a number of firearms over the course of their law enforcement activities. How many recovered firearms are in the DOJ's possession? Does the DOJ test fire all recovered firearms to enter ballistic evidence into NIBIN? If not, what percentage of recovered firearms are test fired? What is the protocol for what firearms should and should not be test fired?

Answer. All four Department of Justice law enforcement components (ATF, FBI, the Drug Enforcement Administration (DEA), and the U.S. Marshals Service (USMS)) routinely recover firearms in the course of their operations. Oftentimes, however, State and local law enforcement partners are the actual seizing entity of these firearms for evidentiary reasons. Moreover, the Department does not specifi-

cally track the number of firearms in the possession of each component at any given time, as that number will vary regularly based on the need to preserve firearms for evidence in criminal prosecutions and during the pendency of forfeiture proceedings. ATF took into custody 24,941 firearms in calendar year 2015. Department policy requires that all its law enforcement components submit for entry into National Integrated Ballistics Information Network (NIBIN) ballistics information (test-fires) from all recovered firearms that are suitable for entry into the network (suitability for entry is further described below). To ensure 100 percent entry of ballistics information for suitable firearms it takes into custody, ATF requires entry of test-fires into NIBIN within 7 days of a firearm being in custody. The other components also follow Department policy requiring 100 percent entry. In calendar year 2015, the number of firearms in ATF custody for which it directly entered test-fire information into NIBIN was 4,041; the other three components directly entered test-fire data from an additional 961 firearms.

In most instances ATF, FBI, DEA and USMS do not directly submit ballistic information from suitable firearms they have recovered into NIBIN, but instead have State or local partners with NIBIN equipment enter the information into the network. This is the most efficient means to enter NIBIN data. Whether the Department component or other partner enters the recovered firearm ballistics information depends upon the circumstances of the particular investigation. For example, in calendar year 2015, State and local partners entered test-fire information into NIBIN for more than 20,000 of the firearms ATF took into custody.

In general, firearms suitable for entry into NIBIN, for which test firing is mandatory, include all semi-automatic pistols including .22 caliber, semi-automatic rifles, 12 gauge shotguns, and long guns that use handgun ammunition. Firearms that are not suitable for entry in NIBIN and are not typically test fired include revolvers, single shot or bolt action rifles, shotguns in other gauges, weapons never fired, or firearms deemed unsafe, inoperable, or incomplete.

Question. What guidance does the DOJ provide to Federal, State, and local law enforcement agencies to facilitate successful submission of ballistics evidence into NIBIN? How does the DOJ assist law enforcement agencies in rural areas connect with NIBIN? What is the DOJ doing to ensure that NIBIN resources are properly utilized and distributed around the country? What steps is the DOJ taking to increase the reach of NIBIN? Is there an established timeline for growing the Network?

Answer. Through ATF, the Department provides substantial guidance to Federal, State, and local partners to encourage and facilitate the submission of ballistics information to NIBIN. One of the primary vehicles ATF uses to provide guidance for the use of NIBIN is through publication and distribution of the NIBIN Reference Guide (the Guide). The Guide provides an outline to law enforcement agencies on how to collect and submit evidence to NIBIN, and sets forth model policies and procedures for agencies to follow to ensure effective and successful use of the system. The guide also provides in-depth guidance on how to successfully utilize NIBIN in the field to support ongoing criminal investigations and to implement long term strategic plans. In addition to publication of the Guide, ATF also provides extensive training to partner agencies on the use of NIBIN technology including a standardized NIBIN Authorization training course as well as more specialized courses on the BrassTRAX system and the use of the network itself. In calendar year 2015, ATF provided training and NIBIN access to 96 new State, local, or Federal users. In addition, the NIBIN staff provided generalized NIBIN training to more than 2,700 law enforcement and/or laboratory entities throughout the United States. Finally, ATF conducts on-site evaluations at partner locations—using both forensic lab and investigative experts—to provide individualized assessments of the effectiveness of the partners' policies and procedures, and recommendations for improvement.

With respect to providing access to NIBIN for law enforcement in rural areas—or to any other department that does not have direct access—ATF will arrange for access to the network for any requesting U.S. law enforcement agency regardless of location. Access can be arranged either through establishment of a use agreement with a nearby State or local NIBIN site, or directly through ATF, utilizing one of ATF's Forensic Laboratories in California, Georgia, or Maryland.

To ensure NIBIN resources are efficiently utilized and appropriately distributed, ATF closely follows and analyzes trends in violent crimes involving firearms and monitors usage of ATF-funded NIBIN equipment. If ATF-funded equipment is not being efficiently and effectively utilized by a NIBIN site, ATF will redeploy the equipment to identified areas of need and provide the training and support necessary for success in the new locations.

The Department is employing a variety of strategies to increase the reach of NIBIN. One of the primary mechanisms to expand NIBIN is educating law enforce-

ment on the value of participating in the network. ATF actively promotes participation in NIBIN throughout the law enforcement community, citing examples of successful investigations and prosecutions to demonstrate the effectiveness of the program in combatting firearm violence. For the network to be the most effective, the more agencies contribute ballistics data to the network, the greater the number of successful correlations there will be between incidents and investigative leads generated to help solve and prevent violent firearm crimes.

ATF also promotes expansion of the network's capacity by facilitating the purchase of NIBIN hardware by agencies with the financial means to do so or, when appropriate to ensure service availability where it is most needed, by funding the purchase of hardware for agencies unable to afford the cost. Regardless of whether an agency self-purchases NIBIN equipment or ATF funds the acquisition, ATF ensures that NIBIN sites meet established security standards and facilitates access to the network via secure telecommunication lines.

Finally, ATF is expanding the reach of NIBIN through the creation of the NIBIN National Correlation and Training Center (NNCTC) in Huntsville, Alabama. The NNCTC began operations in February 2016. It will provide NIBIN correlation (or "matching") services at one national location, rather than requiring local police departments to do that work themselves. The NNCTC will immediately service 10–15 percent of NIBIN partner sites, and expects to bring all other sites on-line within 18 months, depending on funding. When fully operational, it will have the capacity to make connections between crime guns locally, regionally, and nationally. The Department's goal is to initially provide investigative leads to participants within 48–72 hours, and to reduce that time to 24–48 hours when fully operational and staffed. By assuming the correlation function, the NNCTC will allow individual sites to utilize their personnel for NIBIN evidence acquisition, thereby enhancing the reach and effectiveness of NIBIN, and will allow individual sites the option of reducing hardware costs by discontinuing the use of hardware needed to conduct correlations required for NIBIN usage.

Question. What steps is the DOJ taking to transition NIBIN from an investigatory tool to an evidentiary tool?

Answer. NIBIN is an essential element of the Department's violent crime prevention strategy. To ensure the most effective use of NIBIN, over the last several years ATF has restructured the program to expand its use from that of a forensic tool primarily utilized to process firearm ballistics as trial evidence, to a broader use as a holistic investigative mechanism. This enables law enforcement to proactively establish links between firearms used in previously unrelated violent crime incidents, thereby allowing for the identification and apprehension of the shooters responsible for the crime and the sources of the firearms used in those crimes. By providing leads and evidence needed to proactively identify and remove shooters and their firearm suppliers from the streets, NIBIN helps law enforcement prevent and reduce violent firearm crimes.

This is perhaps most apparent in the way that NIBIN has been integrated into ATF's Crime Gun Intelligence Center (CGIC) model. For example, in Denver, Colorado, ATF has established a multi-agency CGIC that centers its investigative strategies on synthesizing NIBIN with other intelligence and investigative tools such as crime gun tracing, acoustic gunshot detection technology, prompt analysis of evidence from separate shooting incidents linked by NIBIN "hits," and human intelligence from witnesses, cooperating defendants, and confidential sources.

The Denver CGIC has extensively educated Colorado law enforcement agencies on the importance of comprehensive collection and processing of firearm ballistics evidence at all shooting scenes, regardless of the crime involved in the discharge of the firearm, for timely submission to NIBIN. When a NIBIN "hit" links shootings, the CGIC engages in immediate follow-up through analysis of reports and all available evidence from each incident to generate actionable leads to its field investigators. By integrating NIBIN with these other tools, the Denver CGIC proactively identifies shooters and sources of crime guns, allowing law enforcement to arrest and prosecute shooters and other offenders at every level of involvement in violent firearm crimes.

QUESTIONS SUBMITTED BY SENATOR JOHN BOOZMAN

Question. Please explain to my fellow Arkansans, and the American people, what the President's "engaged in the business" executive action actually does.

How does it affect our citizens, and how does it combat violent crime?

Answer. The President's "engaged in the business" executive action is a guidance document that explains, in plain language, the Federal law governing when a Fed-

eral license is required to buy and sell firearms. By consolidating statutory provisions, case law, and specific, concrete examples of real-world situations, the guidance provides a road-map for compliance with existing law.

Federal firearms licensees are critical partners in promoting public safety because, among other things, they help keep firearms out of the hands of prohibited persons by running background checks on potential firearms purchasers, ensure that crime guns can be traced back to their first retail purchaser by keeping records of transactions, and facilitate safe storage of firearms by providing child safety locks with every transferred handgun and having secure gun storage or safety locks available any place where they sell firearms.

Question. Also, please explain how we can trust you that this “clarification” of existing law, coupled with the request for 200 more ATF agents, will not turn into harassment for law-abiding citizens who enjoy selling or trading guns with family or friends to enhance their own personal collection?

Answer. This clarification of existing law is just that, clarification. It does not change the Department of Justice’s (the Department) interpretation of the definition of “engaged in the business” or its enforcement priorities, but rather aims to provide additional guidance to the general public so that individuals can analyze their personal circumstances and determine whether their activities constitute dealing in firearms and therefore require a Federal firearms license.

Consistent with our Smart on Crime policy, I have directed the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to continue to focus its resources on illegal firearms traffickers who supply firearms to criminals and other persons prohibited from having them—whether those traffickers are unlawfully engaging in the business of dealing in firearms without a license, or are one of the small number of licensed entities who willfully violate the law to arm dangerous persons. Our efforts are focused not on law-abiding gun owners, but on violent offenders and the illegal firearms traffickers who supply their guns. We will continue that targeted approach going forward with our existing resources, as well as any additional resources we may receive to help reduce violent crime.

Question. Federal prosecutions of gun crimes have continually and significantly declined since the President has taken office. Reports show that Federal criminal weapons convictions are down 34.8 percent from 2005. In the President’s own Executive actions, he stated that for the past several years under the department’s Smart on Crime initiative, the department has focused resources on the most impactful cases, including targeting violent offenders, illegal firearms traffickers, and dangerous individuals who bypass the background check system. In complete contrast, former Attorney General Eric Holder issued a memo in 2010, and another in 2013, which states that prosecutors should generally advocate for a sentence utilizing the sentencing guidelines, with clear permission, and some interpret as a push, to advocate below the guidelines. His 2013 memo goes even further as to require Federal prosecutors to not charge violations that trigger minimum mandatory sentences but in extreme situations, and to not charge certain drug offenses even though the large amount of drugs involved triggered a harsher sentence.

Attorney General Lynch, is former Attorney General Holder’s memo still in effect?

Answer. The memoranda issued by former Attorney General Holder on May 19, 2010 and August 12, 2013, cited in the question for the record, reflects the current policy of the Department.

It is important to prosecute those who violate Federal firearms laws. I have long recognized the importance of ensuring that the Department focuses its limited resources on the most serious cases at the Federal level, and that we also work with State and local partners to ensure that every case receives due attention. In Fiscal Year 2015, the Department actually increased the number of defendants prosecuted for firearms and violent crimes. Also, a large percentage of the Department’s overall total caseload involves crimes of violence and firearms. Any decrease over the last 10 years appears largely consistent with overall crime trends, as the Federal Bureau of Investigation’s (FBI) Uniform Crime Reporting (UCR) data estimate a 16.2 percent decrease nationwide of all violent crimes from 2005 to 2014.

In January 2016, I had a call with all 93 U.S. Attorneys to direct them to continue to focus their resources—as they have in recent years under the Department’s Smart on Crime initiative—on the most impactful cases, including those targeting violent offenders, illegal firearms traffickers, and the most dangerous individuals who acquire weapons illegally or try to manipulate the background check system.

Consistent with a Smart on Crime approach, ATF has several initiatives focusing on gun crimes which pose the most significant threat to public safety, including its new Internet Investigations Center (IIC), which combats illegal firearms trafficking facilitated by the Internet.

Question. Will you be continuing this philosophy, or what are your plans as the AG with regards to filing charges and minimum mandatory sentences?

Answer. As the memorandum issued by former Attorney General Holder on May 19, 2010 reflects, the Department is committed to the *Principles of Federal Prosecution*, as written in Title 9 of the U.S. Attorneys' Manual, Chapter 27. Federal prosecutors should charge the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. USAM 9-27.300. The Department will continue to emphasize that charging, plea agreements, and advocacy at sentencing should always reflect an individualized assessment and fairly represent the defendant's criminal conduct. The 2010 memorandum specifically states that the sentencing "guidelines remain important in furthering the goal of national uniformity throughout the Federal system." Any departures and variances from the guidelines require supervisory approval and must be based on specific and articulable factors that follow from the individualized assessment of the facts and circumstances of each particular case. See "Memorandum to All Federal Prosecutors, Department Policy on Charging and Sentencing, May 19, 2010."

The Department will also continue to utilize its resources to focus on matters with a substantial Federal interest and reserve the most severe mandatory minimum penalties for serious, high-level, or violent drug traffickers, as delineated in the memorandum issued by former Attorney General Holder on August 12, 2013. To achieve this end, this memorandum specifies criteria common to nonviolent low-level drug offenders where prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence, and outlines a framework for sentencing advocacy, which requires the application of the United States Sentencing Guidelines and provides for the utilization of the factors listed in 18 U.S.C. § 3553(a) in certain circumstances. See "Memorandum to the United States Attorneys and Assistant Attorney General for the Criminal Division, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases, August 12, 2013."

Question. Based on a 2013 study conducted by the National Institute of Justice on violent crime reduction strategies such as, gun buybacks, large capacity magazine restrictions, universal background checks, assault weapon bans, and smart gun technology, all were found to be ineffective in combatting and reducing violent crime. With regards to the smart gun technology, NIJ determined that this would be unlikely to affect gun crime because of the number of firearms already in circulation. The President's Executive action authorizes the expenditure of funds by three different departments to further the research into smart gun technology.

How do you justify the Department of Justice spending taxpayers' dollars on a program that evidence already indicates will not likely reduce or affect violent crime?

Answer. Given the toll that gun violence takes in this country, we must continue to advance the science that informs strategies to reduce gun violence, including gun safety technology. This belief is supported by a 2013 report of the Institute of Medicine, *Priorities for Research to Reduce the Threat of Firearm-Related Violence* (<http://www.nap.edu/catalog/18319/priorities-for-research-to-reduce-the-threat-of-firearm-related-violence>), which identified major gaps in the understanding of gun violence and its prevention and stated the importance of investing in and advancing the science related to the prevention of gun violence.

The Presidential Memorandum lays out a plan to expand the Federal Government's investment in and use of gun safety technology. It directs the Departments of Defense, Justice, and Homeland Security to conduct coordinated research and development as well as to regularly review available products and consult with one another to consider whether they are consistent with operational requirements. The memorandum does not establish any requirement for adoption. If the technology is eventually commercialized, the Departments will have to determine whether using such technology is consistent with operational needs.

In June 2013, the National Institute of Justice (NIJ) published *A Review of Gun Safety Technologies*. The review summarized existing and emerging technologies to inform future research, development and innovation in gun safety technology. When it was released, no personalized "smart guns" were commercially available in the United States, but at least three products—two handguns and a shotgun—were at a technology maturity level that can at least be described as pre-production.

The 2013 document referred to in the question was not a research study and was not officially distributed or published by the Department of Justice, but rather was an internal memo written by a then-NIJ deputy director to provide what the document's author refers to as a "cursory summary of select [firearm violence reduction]

initiatives” at that time. The document solely reflects the opinions of its author, and was not the product of an NIJ research grant or study.

Question. In early December, Congress had voted on various firearm related amendments. One was to prevent individuals listed on the terrorist watchlist from legally purchasing firearms.

I would like for you to explain to me as much as possible without being in a classified setting, what the terrorist watchlist is, and how does one come to be placed on it, without violating their due process protections afforded them through the Fifth Amendment of the U.S. Constitution.

Answer. Following the attacks of September 11, 2001, Congress and the President mandated that Federal executive departments and agencies share terrorism information with those in the counterterrorism community responsible for protecting the homeland, such as U.S. Customs and Border Protection (CBP) officers who conduct inspections at U.S. ports of entry, Department of State (DOS) personnel conducting visa and passport screening, Transportation Security Administration (TSA) personnel responsible for aviation security, and domestic law enforcement officers.

Prior to the attacks of September 11, 2001, 9 U.S. Government agencies maintained 12 different watchlists intended to accomplish a variety of purposes. In 2003, the Terrorist Screening Database (TSDB), also referred to as the “terrorist watchlist,” was created by the Terrorist Screening Center (TSC) pursuant to the Homeland Security Presidential Directive Six (HSPD-6) to consolidate the U.S. Government’s numerous watchlists into a single database, and to provide for the appropriate and lawful use of terrorist information in screening processes. To accomplish this, the TSDB contains law enforcement sensitive terrorist identity information consisting of biographic identifying information such as name or date of birth, or biometric information such as photographs, iris scans, and fingerprints. The identity of persons in the TSDB is treated as law enforcement sensitive so that the database can be shared with domestic and foreign screening partners. The TSDB does not include substantive derogatory intelligence information or classified national security information, but nonetheless contains sensitive national security and law enforcement information concerning the identity of known or suspected terrorists. The National Counterterrorism Center (NCTC)’s Terrorist Identities Datamart Environment (TIDE) database contains classified national security information about international known and suspected terrorists, their associates and international terror groups.

The TSDB is continuously updated and receives terrorist identity information for possible inclusion from two sources: (1) the NCTC, which provides information about known and suspected international terrorists; and (2) the FBI, which provides information about known and suspected domestic terrorists. While operated as a focused identities screening database, the TSDB contains two subsets, known as the No Fly and Selectee lists. Generally speaking, the No Fly list contains identities of individuals who are barred from flying on commercial aircraft out of, within, or over the United States because they pose a threat of committing an act of terrorism, while individuals on the Selectee list are subject to heightened levels of security screening.

Terrorist identity information is added to and removed from the TSDB through an ongoing nomination and review process. In general, nominations of known and suspected international terrorists are submitted by Federal departments and agencies (including the FBI) for inclusion in TIDE. NCTC then reviews the nominations and provides the TSDB with Unclassified/For Official Use Only information about the known and suspected international terrorists. Since FBI is responsible for the nominations of known and suspected domestic terrorists, the FBI submits those nominations directly to the TSC.

Inclusion in the TSDB is not a determination that someone has committed a crime. Rather, it is an analytic assessment based on a review of available intelligence and investigative information that the person meets the applicable criteria for inclusion. Interagency-approved policies and procedures provide the standards for this assessment. With limited exceptions, nominations to the TSDB must satisfy minimum identifying criteria to allow screeners and law enforcement officers to be able to discern a match, and must include minimum substantive derogatory information. In order to abide by the Equal Protection Clause of the U.S. Constitution, nominations must not be based solely on the individual’s race, ethnicity, national origin, or religious affiliation. Further, engaging in First Amendment protected activity alone cannot be the basis for nominating an individual for inclusion in the TSDB. These protected activities include the exercise of free speech, the exercise of religion, freedom of the press, freedom of peaceful assembly, and the right to petition the Government for redress of grievances.

Upon receiving a TSDB nomination, TSC personnel review it to determine: (a) whether the biographic information associated with the nomination is sufficient to

support the screening activities of the receiving entities (e.g., CBP, DOS, TSA), that use the data to match to or distinguish an individual against a known or suspected terrorist in the TSDB; and (b) whether the nomination is supported by derogatory information that meets the criteria for inclusion in the TSDB.

Before accepting a new nomination into the TSDB, TSC personnel use a multifaceted review process that involves coordination with NCTC and the nominating agency, as necessary, to verify that the nomination meets the criteria for inclusion and is not based on impermissible grounds. At the conclusion of the TSC's review, TSC personnel will either accept or reject the nomination for inclusion into the TSDB.

As directed by Congress, the Department of Homeland Security (DHS) has established a formal administrative process, the DHS Traveler Redress Inquiry Program (DHS TRIP), which provides the public with a single point of contact for individuals who have inquiries or seek resolution regarding difficulties they may have experienced during travel screening at transportation hubs (such as airports) or during their inspection at a U.S. port of entry. This program acts as a mechanism for travelers who have, for example, been delayed or denied airline boarding, delayed or denied entry into or exit from the United States at a port of entry, or have been repeatedly referred for additional (secondary) screening at an airport. DHS TRIP is also the vehicle through which individuals may seek redress for travel difficulties they perceive to be the result of their inclusion in the TSDB.

When a traveler's inquiry may appear to concern data in the TSDB (i.e., if the individual's name matches or closely matches that of a person listed in the TSDB), the inquiry is referred by DHS to the TSC for further review. In the case of individuals who are, in fact, included in the TSDB, TSC conducts an in-depth review to determine whether the person continues to meet the criteria for inclusion, or whether the person's status should be changed. As part of this review, the TSC contacts the original nominating agency to ensure that its analysis is based on the most recent and complete information available. Where appropriate, the TSC will remove any individual from the TSDB or downgrade the individual's status when information indicates the person no longer meets the specific criteria for inclusion. To the extent feasible and consistent with the national security and law enforcement interests at stake, U.S. persons may receive information regarding the reasons supporting their placement on the No Fly List. The amount and type of information provided will vary on a case-by-case basis, depending on the facts and circumstances. Lastly, the revised redress procedures also provide the opportunity for the person to submit material they believe is relevant to their placement on the No Fly List for review and consideration during an administrative appeal of the No Fly determination.

SUBCOMMITTEE RECESS

The subcommittee stands in recess, subject to the call of the chair. Thank you very much.

[Whereupon, at 12:56 p.m., Wednesday, January 20, the subcommittee was recessed, to reconvene subject to the call of the Chair.]